

No. 16231

United States
Court of Appeals
for the Ninth Circuit

NATIVIDAD SALINAS, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 304, inclusive)

Appeal from the District Court for the District of Alaska,
Second Division

FILED

MAR 22 1959

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court for the District
of Alaska, Second Division

No. 1642 Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NATIVIDAD SALINAS,

Defendant.

INDICTMENT

Chapter 141 SLA 1957

(Sections 65-5-1 and 6 ACLA 1949 as Amended)

The Grand Jury Charges:

Count One

That on or about the 25th day of December, 1957, at Kotzebue in the Second Division of the District of Alaska the defendant Natividad Salinas willfully and maliciously set fire to and burned a dwelling house which contained a restaurant known as the Kotzebue Grill and which contained living rooms on the second floor, the property of himself. (Section 65-5-1 ACLA 1949 as Amended by Chapter 141 SLA 1957.)

Count Two

That on the 25th day of December, 1957, at Kotzebue, in the Second Division of the District of Alaska the defendant, Natividad Salinas willfully and with the intent to injure and defraud the insurer caused a building known as the Kotzebue

Grill building to be burned while it was insured against loss or damage by fire. (Section 65-5-6 ACLA 1949 as Amended by Chapter 141 SLA 1957.)

A True Bill.

/s/ LUTHER DUNBAR,
Foreman.

/s/ RUSSELL R. HERMANN,
United States Attorney.

Bail \$5,000.

[Endorsed]: Filed February 24, 1958.

[Title of District Court and Cause.]

COURT'S INSTRUCTIONS TO THE JURY

No. 1

Ladies and Gentlemen of the Jury:

It now becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations upon and disposition of this case. When you were accepted as jurors you obligated yourselves by oath to try well and truly the matters at issue between the plaintiff and the defendant in this case, and a true verdict render according to the law and the evidence as given you on the trial. The oath means that you are not to be swayed by passion, prejudice or sympathy, or to be influenced or governed by sentiment or conjecture, but that your verdict should be the result of your careful consideration of all the evidence in the case. It is

equally your duty to accept and follow the law as given to you in the instructions of the Court.

No. 2

The defendant is charged in Count No. 1 of the Indictment with the crime of arson in the first degree, committed as follows:

“On or about the 25th day of December, 1957, at Kotzebue in the Second Division of the District of Alaska the defendant Natividad Salinas wilfully and maliciously set fire to and burned a dwelling house which contained a restaurant known as the Kotzebue Grill and which contained living rooms on the second floor, the property of himself.”

The defendant is also charged under Count No. 2 of the Indictment with the crime of burning property to defraud the insurer, committed as follows:

“On the 25th day of December, 1957, at Kotzebue, in the Second Division of the District of Alaska the defendant, Natividad Salinas wilfully and with the intent to injure and defraud the insurer caused a building known as the Kotzebue Grill building to be burned while it was insured against loss or damage by fire.”

To each count of the Indictment the defendant has entered a plea of not guilty which casts upon the United States the burden of proving each and every material allegation of such charge beyond a reasonable doubt.

Each count set forth in the Indictment charges a separate and distinct offense. You must consider

the evidence applicable to each alleged offense as though it were the only accusation before you for consideration, and you must state your finding as to each count in a separate verdict, uninfluenced by the mere fact that your verdict as to any other count or counts is in favor of, or against, the defendant. He may be convicted or acquitted upon either or both of the offenses charged, depending upon the evidence and the weight you give to it, under the Court's instructions; provided, however, that as the wilful burning of the defendant's property is an essential element of both charges, if you find the defendant not guilty of the charge of arson, you must also find the defendant not guilty of the charge under Count No. 2.

No. 3

The law of Alaska defines the crime of arson as charged in Count No. 1 of the Indictment as follows:

“Any person who willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any dwelling house, whether occupied, unoccupied or vacant, * * * whether the property of himself or of another, shall be guilty of arson in the first degree, * * *”

The substance of the offense charged is a wilful and malicious burning of one's property. “Wilfully” means intentionally and not by accident or inadvertence. “Maliciously” as used in this statute, does not mean hatred or ill will, but means a wrongful act done intentionally without legal justifica-

tion or excuse. Before you can find the defendant guilty of the crime of arson as charged in such Count, the Government must prove beyond a reasonable doubt that the defendant intentionally and wrongfully set fire to the building owned by him, and that such building was a dwelling house. To constitute a dwelling house within the meaning of this statute, it is necessary that it be shown that the building was ordinarily used or occupied in whole or in part as a dwelling, although it is not necessary that it be shown it was actually so occupied at the time of the fire. A building may be a dwelling house within the meaning of this term although part of it is used for other purposes.

A burning or actual fire is also an essential element of the crime of arson. It is not necessary, however, that the building be consumed or materially injured, but it is sufficient if any part is burned, however small. It is not necessary that the fire should continue for any particular length of time and the offense will be complete although the fire is put out.

The essential elements of the crime of arson as charged in such Count which the Government must prove beyond a reasonable doubt are: (1) that on or about the date charged and at the place charged in the Indictment, the defendant set fire to the building described in the Indictment, or caused it to be set on fire; (2) that there was an actual fire or burning as defined above; (3) that such act was done by him wilfully and maliciously as these terms are defined above; and (4) that the building

was at the time of the fire intended to be occupied in whole or in part as a dwelling house.

3-A

If a building previously occupied in whole or in part as a dwelling house has been abandoned as to such use, it is not a dwelling house within the meaning of this statute. To constitute abandonment there must be a removal or discontinuance of such use with definite intent not to return. A building does not cease to be a dwelling house during the temporary absence of its occupant.

There is included in the offense of arson in the first degree as charged in the indictment, the lesser offense of arson in the second degree, where a dwelling house is not involved. The law of Alaska provides that any person who wilfully and maliciously sets fire to or burns, or who aids, counsels or procures the burning of any building or structure of whatsoever class or character, whether the property of himself or of another, which is not a dwelling house as defined herein, shall be guilty of arson in the second degree.

If you find from the evidence beyond a reasonable doubt that the Government has established each and every element of the crime charged in Count No. 1 of the Indictment, except that the building was at the time of the fire intended to be occupied in whole or in part as a dwelling house, or have a reasonable doubt as to whether such element has been proven, you should find the defendant not guilty of arson in the first degree, but you

may find the defendant guilty of arson in the second degree.

If, however, you find that the Government has not proven the other necessary elements of arson in either degree or have a reasonable doubt thereof, you should find the defendant not guilty of the crime of arson in either the first or second degree.

You are further instructed that the mere proof of the burning of a building is not enough to establish the crime of arson, and that in accordance with the presumption of innocence the law presumes a fire to have been accidental and not of criminal design, and that before you can find the defendant guilty of arson in either degree the prosecution must overcome such presumption by competent evidence beyond a reasonable doubt that such burning was wilful and malicious.

No. 4

The crime of burning property with intent to defraud the insurer, as charged in Count No. 2 of the Indictment, is defined by Alaska law as follows:

“Any person who willfully and with intent to injure or defraud the insurer sets fire to or burns or attempts so to do or who causes to be burned or who aids, counsels or procures the burning of any building, structure or personal property of whatsoever class or character whether the property of himself or of another, which shall at the time be insured by any person, company or corporation against loss or damage by fire, * * *” shall be punished accordingly.

In order to establish this crime charged, it is necessary for the Government to prove beyond a reasonable doubt that the defendant wilfully set fire to the building described with a fraudulent intent and purpose to collect insurance money. The terms "wilfully" and "burning" have been defined.

The essential elements of this crime as charged in said Count which the Government must prove beyond a reasonable doubt are, therefore, as follows: (1) that on or about the date charged and at the place charged in the Indictment the defendant caused the building described therein to be burned, as such term is defined herein; (2) that such act was done by him wilfully; (3) that said building was at the time of such fire insured by him against loss or damage by fire; and (4) that such act was done by him with intent to injure and defraud the insurer by wrongfully claiming or collecting insurance loss.

No. 5

Intent may be proved by direct evidence such as any declarations or admissions of the accused, or by indirect evidence, as where facts and circumstances are such as to warrant the inference of intent. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye-witness to the state of mind with which the acts of a person were done. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged. It is reasonable to infer

that a person ordinarily intends the natural and probable consequences or results of acts knowingly done by him. *

In determining the issue as to intent, the jury are entitled to consider any statements made or acts done by the accused, and all facts and circumstances in evidence which may aid in the determination of such state of mind.

No. 6

The indictment in this case, as in all cases, is merely the formal accusation presented against the defendant by the grand jury. You can indulge in no presumption against him simply by reason of the fact that he has been indicted, because an indictment is no evidence of guilt.

The law presumes every person charged with a crime to be innocent. This presumption of innocence remains with the defendant throughout the trial and must be given effect by you unless and until, by the evidence introduced before you, you are convinced that the defendant is guilty beyond a reasonable doubt.

The evidence in a criminal case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated to by the parties, and all applicable inferences and presumptions referred to in these instructions.

An inference is a deduction or conclusion which reason and common sense lead the jury to draw from facts which have been proven.

A presumption is an inference which the law requires the jury to make from particular facts, in the absence of convincing evidence to the contrary. A presumption continues in effect until overcome by evidence to the contrary.

No. 7

A reasonable doubt is a fair doubt based upon reason and common sense and arising from the evidence, or from the lack of evidence. It is rarely possible to prove anything to an absolute certainty. By "reasonable doubt" is not meant any vague or possible doubt, or one which may be created out of sympathy for the accused or the bare possibility of innocence, or a desire to escape from an unpleasant duty, but is such a doubt as would cause reasonable men to hesitate to act upon in matters of importance in their own affairs.

If, after examining carefully all of the facts and circumstances of the case, considering the law as stated by the Court, you have a settled and abiding conviction of the guilt of the defendant, amounting to a moral certainty, then you are satisfied of guilt beyond a reasonable doubt.

No. 8

All questions of law, including the admissibility of testimony, the construction of statutes and other writings, and other rules of evidence, are to be decided by the Court, and all discussions of law addressed to the Court. Since the law places upon the Court the duty of deciding what testimony may

be admitted in the trial of the case, you should not consider any testimony that may have been offered and rejected by the Court, or admitted and thereafter stricken out by the Court.

It is the exclusive province of the jury to determine the facts in the case, applying the law thereto as declared to you by the Court in these instructions; and all questions of fact, as disclosed by the evidence admitted before you and the legal presumptions arising therefrom, must be decided by the jury, and all evidence addressed to them. Therefore the greater responsibility in the trial of this case rests upon you, as the triers of the facts.

You are the sole judges of the credibility of the witnesses. In determining the credit you will give to a witness and the weight and value you will attach to his testimony, you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or against any of the parties to the case; the probability or improbability of the statements of such witness; the opportunity he had to observe and be informed as to matters respecting which he gave evidence before you; and the inclination he evinced, in your judgment, to speak the truth or otherwise as to matters within his knowledge.

No. 9

A witness may be impeached or discredited by contradictory evidence; or by evidence that at other

times the witness has made statements which are inconsistent with the witness's present testimony;

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars; and you may reject all the testimony of that witness, or give it such credibility as you may think it deserves.

No. 10

The rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions. An expert witness is an exception to this rule. A witness who by education and experience has become expert in any art, science, profession or calling may be permitted to state his opinion as to a matter in which he is versed and which is material to the case, and may also state the reasons for such opinion. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves; and you may reject it entirely if you conclude the reasons given in support of the opinion are unsound.

No. 11

You are instructed that the defendant is entitled to take the stand as a witness in his own behalf, but he need not do so, and his failure to take the stand as a witness in his own behalf and his waiver

of that right, shall not create any prejudice against him in the minds of the jury.

No. 12

Two classes of evidence are recognized and admitted in courts of justice, upon either or both of which, if adequately convincing, juries may lawfully find an accused guilty of crime. One is direct evidence and the other is circumstantial. Direct evidence of the commission of a crime consists of the testimony of every witness who, with any of his own physical senses, perceived any of the conduct constituting the crime, and which testimony relates what thus was perceived. All other evidence admitted in the trial is circumstantial, and insofar as it shows any acts, declarations, conditions or other circumstances tending to prove a crime in question, or tending to connect the defendant with the commission of such a crime, it may be considered by you in arriving at a verdict. The law makes no distinction between circumstantial evidence and direct evidence as to the degree of proof required for conviction, but respects each for such convincing force as it may carry and accepts each as a reasonable method of proof.

No. 13

The law makes you, subject to the limitations of these instructions, the sole judges of the effect and value of evidence addressed to you.

However, your power of judging the effect of evidence is not arbitrary, but is to be exercised with

discretion and in obedience to the rules of evidence.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against the declarations of witnesses fewer in number, or against a presumption or other evidence satisfying your minds.

Evidence is to be estimated not only by its own weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

Oral admissions of a defendant should be viewed with caution.

No. 13-A

In arriving at a verdict in this case, the subject of penalty or punishment is not to be discussed or considered by you, as that matter is one that lies solely with the court and must not in any way affect your decision as to the innocence or guilt of the defendant.

No. 14

At the close of the trial counsel have the right to argue the case to the jury. The arguments of counsel, based upon study and thought, may be, and usually are, distinctly helpful; however, it should be remembered that arguments of counsel are not evidence and cannot rightly be considered as such. It is your duty to give careful attention to the

arguments of counsel, so far as the same are based upon the evidence which you have heard and the proper deductions therefrom, and the law as given to you by the Court in these instructions. But arguments of counsel, if they depart from the facts or from the law, should be disregarded.

No. 15

The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

While no juror should yield a sincere conclusion, founded upon the law and the evidence of the case, in order to agree with other jurors, every juror, in considering the case with fellow jurors, should lay aside all undue pride or vanity of personal judgment, and should consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest desire to get at the truth, and with the view of arriving at a just verdict.

No juror should hesitate to change the opinion he has entertained, or even expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors. But before a verdict of guilty can be rendered, each of you must be able to say, in answer to your individual consciences, that you have arrived at a settled conviction, based upon the law and the evidence of the case and nothing else, that the defendant is guilty.

No. 16

You are to consider these instructions as a whole.

It is impossible to cover the entire case with a single instruction, and therefore, you should not single out one particular instruction and consider it by itself.

Your duty is to determine the facts of the case from the evidence submitted, and to apply to these facts the law as given to you by the Court in these instructions. The Court does not, either in these instructions or otherwise, wish to indicate how you shall find the facts or what your verdict shall be, or to influence you in the exercise of your right and duty to determine for yourselves the effect of evidence you have heard or the credibility of witnesses.

Finally, while you are not justified in departing from the evidence or the rules of law as stated by the Court, you may, in determining any question applying to the facts of this case, resort to the common sense and experience in the affairs of life which you ordinarily use in your daily transactions and which you would apply to any other subject coming under your consideration and demanding your judgment.

No. 17

Upon retiring to your jury room you will select one of your number foreman who will speak for you and sign the verdicts unanimously agreed upon.

You will take with you to the jury room these instructions together with the exhibits and five forms of verdicts. The first three relate to the first count and numbers four and five to the second count of the Indictment. If you find the defendant guilty of the crime of arson in the first degree as

charged in Count No. 1 of the Indictment, you will have your foreman date and sign verdict No. 1; if you find the defendant not guilty of the crime of arson in the first degree but guilty of the crime of arson in the second degree, you will have your foreman date and sign verdict No. 2; if you find the defendant not guilty of arson in either the first or second degrees, you will have your foreman date and sign verdict No. 3. If you find the defendant guilty of the crime of burning property with intent to defraud the insurer as charged in Count No. 2 of the Indictment, you will have your foreman date and sign verdict No. 4. If you find the defendant not guilty of such charge, you will have your foreman date and sign verdict No. 5.

If you agree upon your verdicts during court hours, that is, between 9 a.m. and 5 p.m., you should have your foreman date and sign them and then return them immediately into open court in the presence of the entire jury, together with the exhibits and these instructions. If, however, you do not agree upon such verdicts during court hours, the verdicts, after being similarly dated and signed, may be sealed in the envelope accompanying these instructions. The foreman will then keep them in his possession unopened and the jury may separate and go to their homes, but all of you must be in the jury box when the court next convenes at 10 a.m., when the verdicts will be received from you in the usual way. In the event that you use this method of sealed verdicts, you are admonished not to make any disclosure concerning the verdicts to

anyone, and not to speak with anyone concerning the case until the verdicts have been returned in open court.

Dated at Nome, Alaska, this 29th day of April, 1958.

/s/ WALTER H. HODGE,
District Judge.

[Endorsed]: Filed May 1, 1958.

[Title of District Court and Cause.]

ADDITIONAL INSTRUCTIONS TO THE JURY

Ladies and Gentlemen of the Jury:

The situation is this: this, as you can readily see, is an important case. It has taken seven days of trial. In all probability it cannot be tried better or more exhaustively than it has on each side. You must take into consideration that the case at some time must be decided and that you were selected in the same manner and from the same source from which any future jury must be chosen, and there is no reason to believe that the case will eventually be submitted to a jury which is more intelligent, more impartial or more competent to decide it. In fact it has been my impression that this jury represents as intelligent and as capable a cross-section of this District as it is possible to achieve. We must also bear in mind that any future trial,—in any future trial, it appears doubtful whether any more clear evidence will be produced on one side or the

other, because the case has apparently been very exhaustively tried on both sides. It appears that everyone who had any connection with or knew anything of this fire has been summoned here as a witness.

In conferring together you ought to pay proper respect to each other's opinions as stated in my original instructions. And while no juror should yield a sincere conclusion founded upon the law and the evidence of the case in order to agree with other jurors, and while the Court does not want any juror to surrender his or her convictions, unless honestly convinced that his convictions are erroneous, and although the verdict to which a juror agrees must, of course, be his or her own verdict and not a mere acquiescence in the convictions of other jurors with which he does not agree, yet it is necessary that the jury further deliberate in an effort, in a spirit of fairness and candor, to arrive at a unanimous result, because the law contemplates that the verdict of a jury should be the result of concurrence of twelve men and women.

Jurors have frequently disagreed and history shows us that with further deliberation those differences of opinion can or may be fairly worked out if each juror will, in fairness and candor to the opinions of other jurors, go over the evidence again and in the light of the law as given you in the instructions of the Court examine each of these questions submitted to you more exhaustively and in the light of such fairness and candor and deference to the opinions of others.

There is another feature here which is bad, which is that this case has apparently been talked about a great deal over town. It would be most difficult to obtain another jury who would be more fair and less influenced by gossip or opinion in the community than this jury is.

I therefore must urge that you again retire and consider all of the evidence in the light of the Court's instructions, and continue your deliberations in an effort to reach a unanimous verdict and report at such later time as may appear desirable.

A copy of these additional instructions will be sent in to you as soon as they are prepared by the reporter, so that you must retire and continue deliberations at this time.

Dated at Nome, Alaska, this 30th day of April, 1958.

/s/ WALTER H. HODGE,
District Judge.

[Endorsed]: Filed May 1, 1958.

[Title of District Court and Cause.]

VERDICT NO. 2

We, the jury duly empaneled and sworn to try the above entitled cause, do find the defendant, Natividad Salinas, guilty of the crime of arson in the second degree, as included in the offense charged in Count No. 1 of the Indictment.

Dated at Nome, Alaska, this 1st day of May, 1958.

/s/ WILLIAM BROWN,
Foreman.

[Endorsed]: Filed May 1, 1958.

[Title of District Court and Cause.]

VERDICT NO. 5

We, the jury duly empaneled and sworn to try the above entitled cause, do find the defendant, Natividad Salinas, not guilty of the crime of burning property with intent to defraud the insurer, as charged in Count No. 2 of the Indictment.

Dated at Nome, Alaska, this 1st day of May, 1958.

/s/ WILLIAM BROWN,
Foreman.

[Endorsed]: Filed May 1, 1958.

[Title of District Court and Cause.]

VERDICT NO. 1

We, the jury duly empaneled and sworn to try the above entitled cause, do find the defendant, Natividad Salinas, guilty of the crime of arson in the first degree, as charged in Count No. 1 of the Indictment.

Dated at Nome, Alaska, this day of,
1958.

.....,
Foreman.

[Title of District Court and Cause.]

VERDICT NO. 3

We, the jury duly empaneled and sworn to try the above entitled cause, do find the defendant, Natividad Salinas, not guilty of the crime of arson in either the first or second degree.

Dated at Nome, Alaska, this day of, 1958.

.....,
Foreman.

[Title of District Court and Cause.]

VERDICT NO. 4

We, the jury duly empaneled and sworn to try the above entitled cause, do find the defendant, Natividad Salinas, guilty of the crime of burning property with intent to defraud the insurer, as charged in Count No. 2 of the Indictment.

Dated at Nome, Alaska, this day of, 1958.

.....,
Foreman.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT OF ACQUITTAL
NOTWITHSTANDING THE VERDICT
AND, IN THE ALTERNATIVE, FOR A
NEW TRIAL

Defendant moves the court to set aside the verdict of guilty returned in the above-entitled action on May 1st, 1958, and to enter judgment of acquittal in accordance with the motion made by the defendant at the close of all the evidence herein. In the alternative, defendant moves the court to set aside the verdict and grant him a new trial for the following reasons:

1.

The court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.

2.

The verdict is contrary to the weight of the evidence.

3.

The verdict is not supported by substantial evidence.

4.

Court erred in refusing to require prosecution to elect upon which count defendant be prosecuted.

5.

Court erred in overruling defendant's motion to dismiss Count II upon the grounds it failed to allege facts sufficient to constitute a crime.

6.

Court erred in overruling defendants motion for judgment of acquittal on both counts of the indictment made at the close of the prosecution's case; and, at the close of all the evidence.

7.

On the grounds of newly discovered evidence which:

(a) Was discovered since the trial; (b) That the testimony was material to establish an alibi for the defendant but the witness could not be located prior to or during the trial, although subpoena had been issued and placed in the hands of the U. S. Marshal; (c) The testimony is not cumulative or impeaching; and (d) it is material to the issues involved; and (e) it is of such a nature that, on a new trial, the newly discovered evidence would probably produce an acquittal.

8.

That the verdict was a compromise verdict coerced by the courts refusal to discharge the jury for thirty one hours after the jury had been out sixteen hours and had reported to the court after 16 hours that the jury was deadlocked and could not agree.

9.

Misconduct on the part of the bailiff in securing a dictionary for the jury without the consent of the court. That evidently the dictionary contributed greatly to the arrival at a verdict for within forty

minutes after securing the said dictionary the jury arrived at a verdict.

10.

That the verdict is erroneous for the reason that the crime of arson in second degree is not an included crime in arson in the first degree; and for the reason that when the jury found the defendant not guilty of the crime of arson in the first degree and not guilty of burning with the intent to defraud insurer, they in effect found that there was no malice intent or motive involved.

11.

The court erred in not setting out in the instructions a definition of the crime of arson in the second degree.

12.

The verdict is inconsistent in that there were two offenses growing out of the same transaction, and one offense includes elements or acts necessary to the commission of the other offense, a verdict of acquittal of one is inconsistent with a verdict of guilty on the other.

Dated this 5th day of May, 1958.

TAYLOR & TAYLOR,
FRED D. CRANE,
Attorneys for Defendant.

/s/ By FRED D. CRANE,
Of Counsel.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 5, 1958.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION
FOR NEW TRIAL

United States of America,
Territory of Alaska—ss.

Warren A. Taylor, being first duly sworn upon his oath, deposes and says: That at about 3 o'clock P.M. on the 1st day of May, 1958, affiant was in the United States Court House at Nome, Alaska, and that about that time he saw W. W. Laws, the bailiff of the Jury in the above entitled cause, leave the Court Room adjacent to the Jury Room and go to the Office of the United States Commissioner located on the ground floor of the said Court House.

That he emerged therefrom within a minute with a large Black Book and went to the door of the Jury Room and handed to one of the jurors the said book who thereupon returned to the Jury Room.

The affiant believes that the said book was a dictionary, as he was told so by the bailiff.

That the use of said dictionary without the permission of the Court constitutes misconduct as the Court must instruct the jury upon the definition of words and phrases and all other matters upon which the jury requires enlightenment. Affiant believes that the said book was instrumental in causing the jury to arrive at a verdict, as, within one half hour after getting said book they arrived at a verdict.

/s/ WARREN A. TAYLOR.

Subscribed and sworn to before me this 1st day of May, 1958.

[Seal] /s/ FRED D. CRANE,
Notary Public in and for the Territory of Alaska.

My commission expires 10/15/60.

[Endorsed]: Filed May 5, 1958.

[Title of District Court and Cause.]

MEMORANDUM

Answer to Defendant's Motion for Judgment of Acquittal Notwithstanding the Verdict and, in the Alternative for a New Trial.

Defendant has claimed twelve reasons in support of his motion. Numbers 1, 2, 3, 4, 5, and 6 were previously urged during and at the close of the trial and will not be covered in detail in this memorandum as they have been fully covered before. The other six grounds will be answered fully below.

I.

Defendant's first argument in his brief is concerned with numbers 10 and 12 in that the crime of arson in the second degree is not included in a charge of arson in the first degree and that a verdict of not guilty would necessarily preclude of verdict of guilty on the other as the crimes grow out of the same transaction.

Statutes involved in a discussion of this matter are as follows:

Section 66-12-9 ACLA 1949. Conviction or ac-

quittal of crime consisting of different degrees. That when the defendant shall have been convicted or acquitted upon the indictment for a crime consisting of different degrees, such conviction or acquittal is a bar to another indictment for the crime charged in the former, or for any inferior degree of that crime, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that indictment, as provided in sections 66-13-56 and 66-13-57. (CLA 1913, Sec. 2216; CLA 1933, Sec. 5286.)

Section 66-13-73. Conviction of degree inferior to charge or of attempt. That upon an indictment for a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment and guilty of any degree inferior thereto, or of an attempt to commit the crime or any such inferior degree thereof. (CLA 1913, Sec. 2268; CLA 1933, Sec. 5362.)

Section 66-13-74. Conviction of included crime or attempt. That in all cases the defendant may be found guilty of any crime the commission of which is necessarily included in that with which he is charged in the indictment or of an attempt to commit such crime. (CLA 1913, Sec. 2269; CLA 1933, Sec. 5363.)

Section 66-13-75. Effect of doubt as to degree of crime. That when it appears that the defendant has committed a crime, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of

those degrees only. (CLA 1913, Sec. 2252; CLA 1933, Sec. 5342.)

Section 66-13-74 ACLA 1949 is virtually the same as Federal Rule 31 (c), Federal Rules of Criminal Procedure. (*Barbeau vs. United States* 193 F 2d 945, 9th Cir.) None of the other Federal Rules seem to be inconsistent with the other statutes quoted above.

Section 66-12-9 ACLA 1949 would indicate that when a person is indicted for an offense consisting of one or more degrees, the issue of guilt as to lesser degree must be submitted at the trial of the more serious degree of the crime, as an acquittal of a more serious degree is an acquittal of all lesser degrees of the offense. This rule indicates that a charge to the jury of the lesser degree of the offense would be proper wherever the evidence indicates such an offense is present. The rule would certainly make it impossible to have two trials, one for each degree of a particular crime. The issue of guilt as to any degree of the crime must be determined at one trial.

Section 66-13-73 ACLA 1949 certainly indicates that in crimes consisting of degrees the jury may make of a finding as to any degree of the offense. This statute specifically concerns crimes which are broken in to degrees as distinguished from types of crimes for which there may be lesser crimes of the same general nature. In the present case arson is broken into four degrees by statutes. This section of the code necessarily applies wherever the evidence warrants its application.

Section 66-13-74 ACLA 1949 deals with necessarily included crimes as distinguished from inferior degrees of the same crime. By its construction any crime necessarily included in that under the indictment are considered to be included in the indictment. It is the government's contention that the present case falls under Section 66-13-73 ACLA 1949 and also under Section 66-13-74 ACLA 1949 if second degree arson is considered a separate crime from arson in the first degree.

Section 66-13-75 ACLA 1949 virtually makes it mandatory to include the offense of second degree arson as a large part of the defense was to throw doubt as to the degree of the crime committed. Even without the other statutes above, this rule would require submission of the charge of second degree arson to the jury.

At page one of his brief defendant cites *Giles v. United States* 144 F. 2d, 860 as authority that the lesser included offense must "necessarily" be included in the greater. The *Giles* case concerned a conviction for negligent pointing of firearms where the indictment was for negligent homicide. This case is distinguished from the present case for two reasons; 1—the conviction was not for an inferior degree of an offense consisting of more than one degree. 2—even as a lesser offense the negligent pointing of firearms had one element not included in negligent homicide, namely, an intentional pointing of the firearm. In the present case there is no element in arson in the second degree which is not included in arson in the first degree. A dwelling

house is necessarily a building, although a building is not necessarily a dwelling house. Thus a person charged with arson of a dwelling is necessarily charged with arson of a building. The character of the structure is the only difference between the two degrees although both degrees do include a building, the second degree being less particular about the character of the building. The Giles case does not, therefore, present a true example of the case in point. The dicta in the Giles case actually supports the government's contention in the present case. The present case does meet the test required in the Giles case although it is not really necessary that it do so because we are dealing with one crime consisting of more than one degree as distinguished from two crimes, one of which might be included in the other.

A case more in point is *United States vs. Barbeau* (92 F. Supp. 196), and *Barbeau vs. United States* (193 F 2d 945) a Ninth Circuit decision based on an Alaskan case decided by Judge Dimond of the 3rd Division. In that case the court held that a person indicted for first degree homicide could be convicted of negligent homicide. The court held; 1—the gravamen of first degree homicide was the same as that for negligent homicide although one required a deliberate killing and the other only a negligent accident, and 2—that the indictment for first degree homicide put the defendant on notice that he would be convicted of negligent homicide.

In this case the circuit court also pointed out at p. 948 that since the whole defense had been one of negligent homicide that it was too late to claim

error in allowing a conviction on that charge. The court also distinguished *Giles v. United States* supra from the case under decision. It is submitted that *Barbeau vs. United States* is on all fours with the present case.

II.

The next specification made by defendant concerns an alleged inconsistency of the Verdict.

As a general rule an inconsistent verdict is not considered an error in the trial. Examples of this proposition are numerous.

In *Dunn v. United States* (284 U.S. 390), a case where a corporation and a corporate official had each been accused of a crime because of an act committed by the official while acting as an official and where the corporation was found not guilty and the official guilty, the court said:

“Whether the jury’s verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer * * *
Juries may indulge in precisely such motives or vagaries.”

(See also *United States vs. Dotterweich* 320 U.S. 277 at 279.)

A very recent case in point is *Green vs. United States*, 355 U.S. 184. In that case the defendant was indicted for arson and first degree homicide under the felony murder rule. He was convicted of arson and second degree murder. Since he was charged

under the felony murder rule, the verdict as to second degree homicide was inconsistent. The Supreme Court reversed the case but sent it back for a new trial for the crime of second degree homicide and held that the man could not be retried for first degree homicide. The verdict of guilty as to the arson when a homicide was included is of course inconsistent with second degree homicide for if arson results in a death it should be first degree homicide.

Most of defendant's cases dealing with inconsistent verdicts do not concern verdicts dealing with different degrees of the same offense, but deal with charges where more than one crime was alleged to have been committed by a single act. In such cases it is of course true that if the overt act is not proven that the jury can not make a finding of guilty as to either count. For example in *Rosenthal vs. United States*, 276 Fed. 714 (9th Cir.), cited at page four of the brief, the defendant was charged with two counts relating to stolen property. In count one he was charged with buying and receiving stolen property with guilty knowledge and in count two of possessing the same property with guilty knowledge. Naturally if the jury, in such a case, could not find guilty knowledge it could not convict on either charge. In the present case the difference between the two counts was the character of the building. No other fact, other than the ultimate fact of guilt, was under dispute. A verdict of not guilty of one degree would not therefore preclude a verdict of guilty on the other degree and the jury could in no event find a verdict of guilty as to both degrees.

James vs. United States cited at page six of defendant's brief decided that burglary in a dwelling house did not include burglary not in a dwelling house. The court in deciding that case, however, noted other differences in the statute. Burglary not in a dwelling house requires proof that the building is used for the storage of property a separate element not required in the crime of burglary in a dwelling house. There again, the court was dealing with two separate statutes and not one statute consisting of several degrees. The requirement of notice of the nature of the charge is more strict in respect to a lesser included offense than it is for a lesser degree of the same offense. *Barbeau vs. United States supra*, which held that a charge of first degree homicide put the defendant on notice as to a possible conviction of negligent homicide, is controlling.

III.

In his eighth specification defendant charges that the court erred by its refusal to discharge the jury after sixteen hours when the foreman reported it was deadlocked.

It is submitted, first, that the jury never actually reported it was deadlocked. What the foreman reported was that the jury had been out all night and that there had been no change in the ballots since about midnight. The jury had adjourned to sleeping quarters at about 2:30 A.M. This is a far cry from a report of a deadlock.

No specific period of deliberation has ever been established and the court must determine when a

disagreement is sufficient to justify a discharge. Unless this discretion is greatly abused it will not be overruled. (15 American Juris Prudence "Criminal Law" Section 420 p 86.)

The matter of giving further charges to the jury after they have deliberated and have not come to an agreement is annotated quite fully at Title 18 U.S.C.A. under Rule 30 note 40. All the cases there cited are quite consistent with the charge made by the court in the present case. The instructions given are quite similar to those given in *Wright vs. United States*, 175 F 2d 384, cert. denied 70 S. Ct. 143, 338 U.S. 873.

As to the length of time a jury may be left out one Alaskan case which is quite similar is *Shea vs. United States* (C.C.A. Alaska, 260 F 807) in which the jury was out thirty hours after which it was urged to agree. Another federal case in point where a similar instruction was given after deliberation is *United States vs. Samuel Dunkel and Co.* (C.A.N.Y. 1949, 173 F 2d 506). In that case the decision below was reversed, but only because the judge inquired as to how the jury was divided. As long as the judge does not inquire into the state of the deliberations it does not seem to be error to call them in and carefully request them to try and reach an agreement. The usual charge, often called the "Allen Charge," is taken from *Allen vs. United States* (164 U.S. 492 at page 501). *United States vs. Olweiss*, 138 F 2d 798 is also in point. The Allen Charge seems to be satisfactory except when coupled with an inquiry into the division of the jury.

United States vs. Samuel Dunkel & Co. *supra* at 508. The leading 9th Circuit opinion in this subject is *Quong Duck vs. United States* (293 F 563), this was a reversal, but based partially on an inquiry as to the division of the jury. (See *United States vs. Olweiss* *supra* at 801). At page 801 of the *Olweiss* decision it is pointed out that the Supreme Court has never followed the *Quong Duck* decision.

IV.

The next specification of error claimed by defendant is that the bailiff violated the rule in respect to keeping the jury apart from others until it has reached its verdict. Defendant claims, and plaintiff concedes that the jury was allowed to have a dictionary before it had presented its verdict in open court. Plaintiff does not concede that the jury had not reached a verdict at the time it received the dictionary.

As a first defense to this contention plaintiff urges that it is now too late to claim error in this respect as an objection should have been raised before the verdict was received in open court. Defendant's affidavit shows that they knew of the incident before the verdict was received and the jury discharged. When the defense knows of misconduct on the part of a juror it becomes his duty to report such misconduct or otherwise he is in no position to claim his rights were prejudiced. (*Bowers vs. United States*, 244 F 641.) This theory is discussed at length at 96 A.L.R. page 530 and annotated by numerous cases, all of which hold that misconduct

by anyone in connection with the jury after their retirement, although it be of a character which might vitiate their verdict if brought before the court by timely complaint, is not available after the return of the verdict as a grounds for a new trial, where the defense counsel knew of the error before the verdict.

In the present case defense counsel knew of the error, if any, before the verdict was received. No doubt the error, if any, could have been cured by an appropriate instruction.

As a second defense to this motion plaintiff contends that no possible prejudice to the defendant could have resulted from the reception of the dictionary by the jury. The rule that nothing should reach a jury which does not do so in court room, particularly after the jury has been locked up, is not an end in itself so that, while lapses should be closely scrutinized, when it appears with certainty that no harm has been done, a reversal is not required. (Federal Practice and Procedure, Barron, Section 2581 page 490, "Rule 52—Harmless Error and Plain Error," citing *United States vs. Compagna*, 146 F 2d 524, at 528 cert. den. 324 U.S. 867 [which cites 96 ALR 889.])

With this theory in mind plaintiff herewith submits affidavits of the bailiff and a juror which indicate that the lapse of seclusion of the jury did not in fact have a prejudicial effect on defendant's case. These affidavits show First; that the dictionary was received after the jury had finished its deliberations, Second; that the purpose for which the dic-

tionary was sought was to determine a definition for "fraud" and "defraud," words used in connection with count two of the indictment and not concerned with either arson in the first degree or arson in the second degree. Since defendant was acquitted on count two, it is impossible that the reception of the dictionary could have had a prejudicial effect to the defendant.

Other cases concerning this matter include the following:

United States vs. Sorcey, 151 F 2d 899 cert. den. 66 S. Ct. 821, 327 U.S. 794 (communication to juror considered presumptively prejudicial but presumption may be rebutted).

United States vs. Carruthers, 152 F 2d 512 cert. den. 66 S. Ct. 805; 327 U.S. 787 (juror read newspaper, but defendant had burden of showing a prejudice).

V.

As to the motion for a new trial generally:

The authority to grant a new trial should be exercised with caution and should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. (Federal Practice and Procedure, *supra*, Section 2281; citing United States vs. Robinson, 71 F Supp 9.)

The trial court's determination on conflicting evidence, on a motion for a new trial for newly discovered evidence, should remain undisturbed except for extraordinary circumstances, (Blodgett vs. United States, 161 F 2d 47, 8th Cir). Newly discov-

ered evidence must be of such a nature as to be admissible under the pleadings and must in fact be newly discovered since the former trial or else have been unknown at the previous trial (Wharton's Criminal Law, Vol 5 Chapter 92 p 347 et seq. Section 2169). Defendant has not shown or given any basis at all that he has in fact evidence of this nature to present at a new trial.

For a verdict to be considered contrary to the evidence it must be more than a verdict against *to* the preponderance of the evidence, there must be a preponderance of proof on the other side of the case. This is a matter largely within the discretion of the trial court. (Wharton's Criminal Procedure, *supra*, at Section 2166.) (Citing *Dunlapp vs. United States*, 43 F 2d 999, 9th Cir.)

If there is competent substantial evidence to support a verdict against the accused, viewing the evidence most favorable to the government, the conviction must be affirmed. (*United States vs. Empire Packing Co.*, 174 F 2d 16, cert. den. 69 S. Ct. 1534, 3337 U.S. 959). The test is whether a reasonable mind can fairly conclude guilt beyond a reasonable doubt, (*Curly vs. United States*, 160 F 2d 229, cert. den. 67 S. Ct. 1511, 331 U.S. 837). The court should not determine the credibility of witnesses or the weight of the evidence. (*United States vs. Toner*, 77 F. Supp. 908, 173 F 2d 140.)

Respectfully submitted,

/s/ RUSSELL R. HERMANN,
United States Attorney.

Acknowledgment of Receipt of Copy Attached.

[Title of District Court and Cause.]

AFFIDAVIT OF W. W. LAWS

United States of America,
Territory of Alaska—ss.

I, W. W. Laws, being first duly sworn upon his oath, deposes and says: That I was the bailiff in the case of the United States of America vs. Natividad Salinas No. 1642 Criminal.

That on May 1, 1958 at about three o'clock P.M. William Brown, foreman, and Robert Schick, venireman, came out of the jury room where the jury had been deliberating and announced that the jury had reached a verdict.

That after receiving this information I went to the marshal's office and announced that the jury had reached a verdict and then went back to the private hallway leading to the jury room. That when I returned Mr. Schick asked for a dictionary and that I went to the United States Commissioner's Office and borrowed a dictionary which I took back and gave to Mr. Schick.

That when I returned with the dictionary Mr. Warren Taylor, attorney for defendant, was in the courtroom with the defendant, Natividad Salinas. That Mr. Taylor said, "What's that," and I said, "a dictionary, is there anything wrong with that," and that then he replied, "No, I guess not."

That shortly thereafter court was convened and the verdict was presented in court.

/s/ W. W. LAWS.

Subscribed and sworn to before me this 2nd day of June, 1958.

[Seal] /s/ BYRON G. REED,
Notary Public for Alaska. My
Commission Expires 8/29/59.

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT SCHICK

United States of America,
Territory of Alaska—ss.

I, Robert Schick, being first duly sworn and on oath, depose and say as follows:

That I was one of the members of the jury empanelled to try the case of United States of America vs. Natividad Salinas, No. 1642 Criminal.

That on May 1, 1958 at about three o'clock in the afternoon the jury reached a verdict which was signed and sealed and that shortly thereafter, and after the bailiff had been notified that we reached a verdict, one of the jurors inquired as to the meaning of "fraud" as distinguished from "defraud." As there was some disagreement as to this the foreman requested the bailiff to get a dictionary, which he did.

That shortly before the bailiff got the dictionary I saw one of the defense attorneys approaching the court house from the direction of Mr. Crane's office and that shortly after the dictionary arrived we went into the courtroom to present the verdict.

That at no time after the dictionary was received

did we continue our deliberations or in any way alter or reconsider our verdict.

/s/ ROBERT C. SCHICK.

Subscribed and sworn to before me this 4th day of June, 1958.

[Seal] /s/ GEORGE A. BAYER,
Notary Public for Alaska. My
Commission Expires 9/14/58.

[Endorsed]: Filed June 4, 1958.

[Title of District Court and Cause.]

RULING

Upon defendant's Motion for Judgment of Acquittal Notwithstanding the Verdict and in the Alternative for a New Trial.

Be It Remembered that at 3:00 p.m. June 6, 1958, the above entitled matter came on regularly to be heard, counsel for plaintiff and defendant being present. Briefs having been submitted and comments of counsel heard, the Court ruled as follows:

The Court: Well, I have given considerable thought to the motion and the briefs, which I have carefully reviewed, and I am prepared to rule upon it.

In the first place, I find a mis-statement here in the first paragraph,—I don't know who prepared this, Mr. Taylor or Mr. Crane,—in which it is stated that the jury superimposed its own verdict

of arson in the second degree, as set forth in Sec. 65-5-2, ACLA, as amended by Ch. 141, SLA 1957. That is not true. The verdict returned on Count I of the indictment was specifically in accordance with the instructions of the Court; they did not superimpose their own verdict in any sense. During the progress of the trial there developed an issue raised by the defendant and consistently urged, that the property involved was not a dwelling house. I found that there was an issue of fact as to whether the previous occupancy of the rooms in the Kotzebue Grill had been abandoned in any previous use regarding dwelling purposes, and therefore found it necessary to submit that issue to the jury. And the jury were so instructed, and in the final instructions were particularly instructed that if they found the defendant not guilty of the crime of arson in the first degree, but guilty of the crime of arson in the second degree, they were to then return Verdict No. II, which is precisely what the jury did, having determined that issue against the Government and in favor of the defendant,—that the property involved was not, in the judgment of the jury, a dwelling house at the time of the fire. This verdict, then, was fully justified by the evidence.

The next point that defendant raises is that there was no pleading of the charge of arson in the second degree and that a verdict of guilty of such crime was speculative or invented by them, which again is wholly wrong.

Now with respect to the legal basis for both the instruction and the verdict, counsel base their con-

tention largely upon decisions of the appellate courts and the District Courts with respect to conviction of a lesser offense as included in a greater offense with which the defendant is charged. As correctly pointed out by the Government in its brief, the question of conviction of a lesser offense does not apply here. But it is a question of a conviction of a lesser degree of the offense charged, which is arson. Our Legislature saw fit to set up several degrees of arson. The evidence developed that there was an issue as to whether it was first or second degree. Sec. 66-13-73 of our Compiled Laws provides that upon an indictment for a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment and guilty of any degree inferior thereto. Sec. 66-13-75 provides that when it appears that the defendant has committed a crime and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of those degrees only. Therefore it was mandatory upon the Court to submit the issue of lesser degree to the jury, and again the evidence justified their verdict.

Attention is also directed to the provisions of Sec. 66-12-9 of our Compiled Laws which provides that when a defendant is convicted or acquitted upon an indictment consisting of different degrees of a crime, such conviction or acquittal is a bar to another indictment for the crime charged, or any inferior degree of that crime.

Therefore, the instructions and the verdict come

clearly within the provisions of our Alaska Code of Procedure. Moreover, I am of the opinion that if the statute with relation to included offenses is instead applicable, that the verdict is likewise justified under the very rule cited by counsel,—I should say the test set forth in decisions cited by counsel,—and that is, to be included in the greater offense, the lesser offense must be such that it is impossible to commit the greater without first committing the lesser. That is certainly true here. It is impossible for the defendant to have committed the crime of arson of a dwelling house without first committing the crime of arson,—burning. So applying that test, if the statute were applicable, I still find that the verdict is entirely justified by the evidence. The situation is wholly different in the cases cited by counsel with which, of course, I am in accord, such as the conviction of assault and battery on a charge of kidnaping. The distinction is obvious. And these cases then are not applicable.

Turning then upon the point of inconsistent verdicts,—that is, it is contended that the verdict of guilty of arson in the second degree is inconsistent with the verdict of not guilty of burning with intent to defraud the insurer. If we go through the evidence, there certainly can be no such inconsistency. They are separate crimes; they involve separate elements. The issue was certainly raised all through the trial and extensively argued to the jury by counsel for the defendant that this defendant could not be guilty of the crime of burning with intent to defraud the insurer because he never made a claim

of loss. The jury obviously were convinced by that argument that the defendant could not be convicted of intent to defraud the insurer where he never claimed any insurance loss. So it was counsel who raised that issue and it was the jury who determined it in favor of the defendant. Therefore I can find no inconsistency in such verdicts. And again the authorities cited by counsel with respect to inconsistent verdicts are certainly not applicable here, for after all, the matter of consistent or inconsistent verdicts depends upon the evidence and the issues raised, because here the same facts were not relied upon by the Government to sustain a conviction in both counts. Other facts to sustain the verdict on the second count were necessary to be shown.

With respect to the dictionary incident, counsel has already stated that he would not urge it in view of the showing made that the dictionary was sent in by the bailiff at the request of one of the jurors after the jury had already arrived at their verdict, and further for the reason that the dictionary was requested to explain to some of the Eskimo jurors the difference between fraud and defraud, which related only to the second count, as to which the defendant was acquitted. In any event the sending in of a dictionary is not a communication contemplated by the statute which may not be permitted to go to a jury, and it is not in any sense an outside influence or any document sent in to influence the jury in arriving at their verdict, and therefore cannot be prejudicial error in any event, unless there be some showing made that the jury used the dic-

tionary to contradict instructions of the court as to legal terms, which does not appear here.

With relation to the sufficiency of the evidence, of course the trial judge is not the judge of the weight or the sufficiency of the evidence. That is a matter for the jury, but the verdict must be sustained if there was evidence upon which a reasonable mind might fairly conclude the guilt of the accused beyond a reasonable doubt. And I find that there certainly was such evidence. I find then, no error in denying the defendant's motion for acquittal at the conclusion of the evidence because there was substantial evidence to go to the jury.

The matter of election upon counts had already been determined by the Court and I adhere to the same ruling.

The same as to defendant's motion to dismiss Count II; and the same as to the Court's order in denying the motion for judgment of acquittal at the close of the Government's case, as to which I find no error.

I cannot quite understand the theory of counsel, which is not urged here, however, of newly discovered evidence.

Mr. Crane: If I might, your Honor, I might clear that up in about two words.

The Court: Yes.

Mr. Crane: I put that in in the hope I would be able to locate Mr. Amundsen and another witness, and I have never been able to contact him. I thought at the time I put that in I would probably have an opportunity to talk to the man, and

find out if he had any evidence that would come under the class of newly discovered evidence, and it is for that reason that it is in there. And had I been able to talk to Mr. Amundsen and had there been anything there, I would now urge it before the Court.

The Court: Well any such evidence would relate to the testimony of Mrs. Salinas in establishing an alibi, would it not?

Mr. Crane: Yes, your Honor, in corroborating it.

The Court: Apparently there is no such new evidence which could have any such effect, and the issue of credibility of Mrs. Salinas' testimony seeking to clear the defendant was certainly very fully argued when submitted to the jury.

The matter of coercion was apparently not urged and I find none. The additional instruction given to the jury has been approved in substance by our own Circuit Court and I think even by the Supreme Court.

Mr. Hermann: It is called the Allen charge, I think.

The Court: Yes, that is what it has been referred to. And the jury in reporting here at 9:30 a.m. in the morning did not actually state it was deadlocked and there was no hope of agreement. They merely said they stood in the same place as they stood at midnight, and this was 9:30 a.m. Meanwhile they had been put to bed; so there was no coercion.

No. 10 we have passed upon.

No. 11 states that the Court erred in not setting

out an instruction on a definition of the crime of arson in the second degree. I think that is error because we certainly did so instruct the jury, in the exact language of the statute, by Instruction No. 3-A.

I find then no merit in any of the grounds upon which the defendant has moved for either judgment notwithstanding the verdict or in the alternative a new trial. I believe the case was fairly tried and the issues thoroughly explored and submitted to the jury. Therefore, the motion will be denied.

We will need to set time for sentence. I presume the defendant is at Kotzebue.

Mr. Crane: Yes. There is a new schedule out now and I can't seem to find out anything from Wien's. The planes go to Kotzebue every day but I can't seem to find out when anything comes back.

The Court: We should allow five days anyhow.

Mr. Crane: I will call him on the phone immediately.

The Court: Five days takes us to the 11th. I can be here at 1:30. I imagine that would be convenient.

(Court thereupon fixed time for sentence at 1:30 p.m., June 11, and advised Mr. Crane that under Rule 33, Federal Rules of Criminal Procedure, newly discovered evidence could be presented before or within two years after final judgment, after which court was recessed until 3:00 p.m.)

[Endorsed]: Filed October 24, 1958.

United States District Court For The District of
Alaska, Second Division

No. 1642 Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NATIVIDAD SALINAS,

Defendant.

JUDGMENT AND COMMITMENT

On this 27th day of June, 1958 came the attorney for the government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Arson in the Second Degree as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four years and that he pay a fine of Five Hundred (\$500.00) Dollars and that he stand committed for said sentence and until said fine is paid or he is otherwise discharged according to law.

It Is Adjudged that the execution under this sentence is suspended for ten days pending notice of appeal, and that the bail bond on appeal is fixed at \$5,000.00.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ WALTER H. HODGE,
United States District Judge.

Recorded in Orders and Judgment, Vol. 14, Page 1027.

[Endorsed]: Filed June 27, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of Appellant: Natividad Salinas, Kotzebue, Alaska.

Name and address of Appellant's Attorney: Fred D. Crane, Nome, Alaska, Taylor and Taylor, Fairbanks, Alaska.

Offense: Violation of Chapter 141 SLA 1957 (Sections 65-5-1 and 6 ACLA 1949 as Amended).

Concise statement of judgment or order:

"On this 27th day of June, 1958 came the attorney for the government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been con-

victed upon his plea of not guilty and a verdict of guilty of the offense of Arson in the Second Degree.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four years and that he pay a fine of Five Hundred (\$500.00) Dollars and that he stand committed for said sentence and until said fine is paid or he is otherwise discharged according to law.”

Name and address of institution where now confined, if not on bail:

Defendant is now out on bail.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated:

/s/ FRED D. CRANE,

Of Counsel for Defendant.

[Endorsed]: Filed July 1, 1958.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To J. M. Kroninger, Clerk of the above entitled Court.

You will please forward to the circuit court of appeals for the Ninth Circuit, copies of all papers in the above entitled case, which includes.

Indictment.

All Written Motions.

Verdict of the Jury.

Motion for a Verdict of Acquittal or in the Alternative, for a New Trial.

Instruction given by the Court to the Jury.

All written Exhibits.

TAYLOR AND TAYLOR,
FRED D. CRANE,
Attorneys for Defendant and
Appellant.

/s/ By FRED D. CRANE,
Of Counsel.

[Endorsed]: Filed October 15, 1958.

[Title of District Court and Cause.]

PLAINTIFF'S DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD ON APPEAL

To: J. M. Kroninger, Clerk of the above-entitled Court.

You will please forward to the Circuit Court of Appeals for the Ninth Circuit, copies of all papers in the above entitled case, which includes:

All decisions of the Court given on written motions.

All verdicts returned by the jury.

All verdicts submitted to the jury.

Plaintiff's memorandum and accompanying affidavits in answer to defendant's motion for a verdict of acquittal or in the alternative for a new trial.

The Court's decision on Plaintiff's motion for a

verdict of acquittal or in the alternative for a new trial.

/s/ RUSSELL R. HERMANN,
United States Attorney.

[Endorsed]: Filed October 22, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Territory of Alaska,
Second Division—ss.

I, J. M. Kroninger, Clerk of the United States District Court for the District of Alaska, Second Division, do hereby certify that the foregoing contains the following original papers requested in the Appellant's designation of record on appeal and the Appellee's designation of additional portions of the record on appeal:

1. Indictment.
2. All written exhibits consisting of Plaintiff's exhibits F, N, O, P, Q, R, S, T, U, V, W, X, Y, Z and AA, Defendant's exhibits 10 and 13.
3. Court's Instructions to the jury.
4. Court's additional instructions to the jury.
5. Verdict No. 2 returned by jury of guilty to the crime of arson second degree.
6. Verdict No. 5 returned by jury of not guilty of burning property with intent to defraud insurer.
7. Verdict form No. 1, 3 and 4 submitted to jury.

8. Defendant's motion for judgment of acquittal notwithstanding the verdict and in the alternative, for a new trial with affidavit of Warren A. Taylor attached.

9. Memorandum answer to defendant's motion for judgment of acquittal with affidavits of W. W. Laws and Robert C. Schick attached.

10. Transcript of Court's decision on motion for judgment of acquittal (file copy).

11. Judgment and Commitment.

12. Notice of appeal.

13. Appellant's designation of record on appeal.

14. Plaintiff's designation of additional portions of the record on appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of this Court this 24th day of October, A.D., 1958.

[Seal] /s/ J. M. KRONINGER,
Clerk.

In The District Court For The District of
Alaska, Second Judicial Division

No. 1642

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NATIVIDAD SALINAS,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Before: Honorable Walter H. Hodge, District
Judge, and a jury.

Appearances: Hon. Russell R. Hermann, United States Attorney, Nome, Alaska, for plaintiff. Mr. Warren A. Taylor, Fairbanks, Alaska, and Mr. Fred D. Crane, Nome, Alaska, for defendant.

Dates: April 21, 22, 23, 24, 25, 28, 29, and 30, 1958.

Place: Nome, Alaska. [1]*

Be It Remembered that at 10:00 a.m. on April 21, 1958, the above entitled cause came on regularly to be heard. The defendant was personally present in court and represented by counsel Mr. Crane; the plaintiff was represented by Hon. Russell R. Hermann, United States Attorney; the Honorable Walter H. Hodge presiding.

The Court: Are the parties ready to proceed?

Mr. Crane: If your Honor please, we are ready to proceed except at this time I have a waiver by the defendant which I submit to the District Attorney for his consent, in which we desire to waive a jury and try this case before the Court.

Mr. Hermann: The Government will not consent.

Mr. Crane: Your Honor, if that is the case, I would hand the waiver to the Court and ask that it be filed. May I approach the bench? I think it is in due form.

The Court: Well, it strikes me that the waiver may not be accepted unless both parties consent. Isn't that true?

* Page numbers appearing at bottom of page of Reporter's Transcript of Proceedings.

Mr. Crane: That's the rule, but I still wish to present it and have it made a matter of record, if I may.

The Court: Very well. Inasmuch as the Government does not consent, the waiver of trial by jury will at this time be denied. Is the Government ready?

Mr. Hermann: The Government is ready, your Honor.

The Court: We will proceed then to empanel a jury in this case.

Mr. Crane: If I might remark, if I may, before the jury is called. I am not alone in this case. Mr. Warren A. Taylor is [13] associated with me and he will join me as soon as the plane arrives. In the meanwhile I will carry on naturally; but just so the jury will know there is co-counsel in the case.

The Court: I should have added to my introductory statement that the Government is represented by Mr. Russell R. Hermann and the defendant by Fred D. Crane and also by Warren A. Taylor of Fairbanks, who will be here, who is expected later this morning.

Mr. Crane: I understand the plane will be in about 10:30.

The Court: We will proceed then to empanel a jury in this case.

(A jury was duly empaneled and sworn) (Mr. Warren A. Taylor appeared in court at 2:00 p.m.)

(At 3:50 p.m. the jury was duly admonished and court adjourned until 10:00 a.m. the following day.)

Be It Remembered that at 10:00 a.m., April 22, 1958, court reconvened and the trial of this cause was resumed. Defendant was personally present and represented by counsel Mr. Crane and Mr. Taylor; the Honorable Walter H. Hodge presiding.

The Court: We will proceed this morning with the case of United States vs. Salinas, the defendant being present with counsel. Will you call the roll please.

(The jury roll was called and all members were present) [14]

(Mr. Herman presented an opening statement on behalf of the plaintiff.)

Mr. Crane: We will reserve our opening statement, your Honor, until after the Government's evidence is in, prior to our defense.

The Court: Very well. The Government may call its first witness.

JOSEPH BRANTLEY

was then called as the first witness for the plaintiff and, after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hermann): Will you state your name, please. Tell the Court and jury your name.

A. Joseph E. Brantley.

(Testimony of Joseph Brantley.)

Q. Where do you reside, Mr. Brantley?

A. Kotzebue.

Q. How long have you lived at Kotzebue?

A. For two years.

Q. Do you know the defendant, Steve Salinas?

A. Yes, I do.

Q. By what name do you know him?

A. Steve Salinas.

Q. Do you know of any other name he uses?

A. Well, I have heard his other name, but I can't say it.

Q. And how were you employed in Kotzebue in the month of December?

A. I was employed by Mr. Salinas as a dinner cook and maintenance man. [15]

Q. How long did you work for him? When did you start? A. December—November 17.

Q. Of '57? A. Yes.

Q. What were your duties on that job?

A. As dinner cook and maintenance man.

Q. Will you speak a little louder, please?

A. Dinner cook, and maintenance; and preparing brakfasts and dinners.

Q. What type of work did you do as maintenance man?

A. Just in the event that anything went wrong with the equipment that we had to work with.

Q. Were you working for him on December 25?

A. Yes, I was.

Q. What was the name of the business where you were working? A. Kotzebue Grill.

(Testimony of Joseph Brantley.)

Q. Where was this business located?

A. About the center of town on the beach front, located between the Postoffice and Ferguson's Mercantile Store.

Q. What type of building was it?

A. A two-story building. It was the long type building, no branching partitions or anything.

Q. What direction was the front of the building facing? A. West.

Q. How was the building facing in relation to Kotzebue Sound?

A. The front of the building was facing the water. [16]

Q. How far from the water was the building?

A. Thirty to forty feet.

Q. I see. What would occupy the bottom floor of this building?

A. Well, the dining room or restaurant part, and kitchen; and there was a deep-freeze and cooler.

Q. What occupied the upper story of the building?

A. It was used mostly for storage and washing of clothes, and Mr. Salinas had a room there. There was another fellow previously employed there that had a room——

Mr. Taylor: Just a moment, your Honor; I am going to object to the volunteered statement of what somebody previously had.

The Court: I cannot see anything prejudicial in it.

Mr. Taylor: It certainly is prejudicial and is not

(Testimony of Joseph Brantley.)

responsive to the question, a volunteered statement not responsive to the question.

The Court: It has been held that the party asking the question may make such an objection, not the adversary. However, it probably is prejudicial here and may be stricken.

Q. (By Mr. Hermann): What type of rooms were upstairs?

A. Well, there is a front room.

Q. What kind of a room was that?

A. A large room. I couldn't tell you the dimensions or size.

Q. How was it furnished?

A. Well it had a washing machine and, you know, spices, jam, canned [17] good, that we used in the restaurant.

Q. What was the room next to that? What kind of a room was that?

A. From that room you went into a hallway; then you had rooms on each side of the hallway.

Q. What kind of rooms?

A. On the right, going east, we had a room which Mr. Salinas used to live in at times, and that was on the right; and then on the left there was a room that was a bedroom; and then you go a little further back and there is another room that wasn't being used; it was on the right-hand side. Then there was a little shelf space off, just a small hallway, from there, where they stored their canned goods.

Q. Would you speak a little louder, please? What was the room next to that?

(Testimony of Joseph Brantley.)

A. Then you get into a back room that had beds and things like that in there not being used, and that was just dead storage in it, in the back.

Q. How was the room that Mr. Salinas sometimes used furnished? How was that furnished?

A. It had a bed——

Mr. Crane: I object to that, your Honor, as assuming a state of fact not in evidence. It is leading and suggestive—"sometimes used".

The Court: He was asked to describe the use; well, he may do so. Objection overruled.

Mr. Crane: I am not objecting to describing the room, but as to who used it. He was asked a question as to who "sometimes used" it. [18]

The Court: Will the Reporter read the question, please.

(The reporter then reads the previous question as follows: "How was the room that Mr. Salinas sometimes used furnished? How was that furnished?")

The Court: Objection overruled. He may answer.

A. He had a bed; he rested on it at times. He had a couple of stands and things that a small hotel room would have, and other personal things and belongings that were in there.

Q. What personal things were there?

Mr. Crane: If the Court please, that's objected to unless the witness knows.

Q. (By Mr. Herman): What personal things were in there, if you know?

The Court: First, would you ask the witness if

(Testimony of Joseph Brantley.)

he knows what personal things were in the room. Then if he does know, you may ask him what things.

Q. (By Mr. Herman): Do you know what type of personal things were in the room?

A. Just some of them; I don't know everything he had in there.

Q. Describe the ones you know.

A. Well, he had his shaving articles and his other things that he used there. He had clothes.

Mr. Crane: I will ask to strike the "other things", your Honor. It's not responsive to the question, and is immaterial, irrelevant and incompetent saying "other things that he used". [19]

The Court: Objection overruled: He may answer.

Q. (By Mr. Hermann): What type of room was across the hall from that room?

A. The two rooms were almost the same in build, and had a bed and a little stand there and a clothes closet in there.

Q. Do you know whether or not there was anything in the clothes closet?

A. Yes. There was something in there; I couldn't say what. I know there were clothes in there of this fellow that previously worked there.

Q. What was the name of the fellow that previously worked there?

Mr. Taylor: Just a minute, your Honor. I believe that is incompetent, irrelevant and immaterial as to who previously worked there unless the time would be shown, not just whether or not somebody else worked in the place.

(Testimony of Joseph Brantley.)

The Court: Well the purpose of this examination, as I judge it to be, is to show whether or not this building was occupied as a dwelling house, and and that is essential.

Mr. Crane: At the time of the fire, your Honor.

The Court: Well, yes. But he may state whether it had been occupied as such previous to the fire, if there was a fire. You could fix the time probably a little better. A. Charlie Norton.

Q. (By Mr. Herman): Do you know where Charlie Norton was on the 25th of December?

A. I understand he was in the hospital in Anchorage.

Q. How long had he been gone, if you know?

A. I can't tell you that; how long he had been gone.

The Court: Well, now, counsel, you should show whether this condition that the witness now describes was the same on the 25th of December, 1957.

Q. (By Mr. Hermann): How were these rooms furnished on the 25th of December, 1957?

A. About the same as I told you.

Q. Do you know whether or not the Kotzebue Grill was open for business on the 25th of December? A. No, it wasn't.

Q. Were you at the Kotzebue Grill on the 25th of December? A. Yes. I was there.

Q. What time did you go there first?

A. Approximately 1 o'clock p.m.

Q. What did you do while you were there?

(Testimony of Joseph Brantley.)

A. I went through to check the fires, to see that they were burning properly and to fuel the stove in there, in Mr. Salinas' room, and have the room warm there.

Q. What parts of the building did you actually go into on that occasion?

A. I went through the whole building where there were stoves. Well, I went through the whole entire building except the cooler and deep freeze.

Mr. Crane: I didn't get that answer. What——

The Court: Cooler and deep freeze.

Q. (By Mr. Herman): What did you see in the back rear-most upstairs room at that time? [21]

A. It was just arranged the usual way, the way it usually is. Nothing unordinary.

Q. How long were you in the entire building on this occasion approximately?

A. Approximately twenty minutes.

Q. Where did you go from there?

A. I went next door to the Fergusons.

Q. Were you back in the Grill at any other time that day?

A. After fueling the stove in his room, I went back to check the fire to see if it was burning properly.

Q. About what time was that?

A. Approximately 3 or 4 o'clock.

Q. What rooms in the building did you enter at that time?

A. I checked all the stoves and went through the building the same as I did before.

(Testimony of Joseph Brantley.)

Q. Were you in the upstairs room, the rear-most room at that time?

Mr. Crane: What time was that?

Q. (By Mr. Hermann): Would you repeat the time, please? A. Approximately 4 o'clock.

Q. A.M. or P.M.? A. P.M.

Q. What did you see in the rear-most upstairs room at that time?

A. It was the same; it was in order, as I previously stated.

Q. How long were you in the building on this occasion?

A. About fifteen minutes the last time. [22]

Q. Where did you go from there?

A. Next door to the Fergusons.

Q. Were you in the Kotzebue Grill at all again on the 25th of December?

A. Yes. I made one more trip to the downstairs part. I didn't go into the upstairs part on my last trip.

Q. What was your purpose on that trip?

A. I was preparing a Christmas dinner for the Fergusons and I saw we would run short so I brought some chicken broth. I went in to obtain a little broth.

Q. On any of these three visits did you see anyone else in the building at all? A. No.

Mr. Crane: I didn't get the time of the third visit.

A. It was approximately an hour later or an hour and a half later.

(Testimony of Joseph Brantley.)

Q. (By Mr. Hermann): How long were you in the building on that occasion?

A. About three minutes.

Q. Did you, at any time, see anyone else in the building on those three occasions?

A. No, I did not.

Q. Do you know whether or not the building was locked on those three occasions when you went in?

A. Yes, it was locked.

Q. Do you know who had the keys to the lock?

A. Yes. [23]

Q. Who had the keys?

A. I had a set of keys for the downstairs part, and Mr. Salinas had a set of keys.

Q. Is it possible to go from the downstairs to the upstairs inside the building?

A. Yes. There is a key for the upstairs part that stays downstairs all the time, for use of the employees for going up and down to the bathroom.

Q. How does one get from the downstairs to the upstairs?

A. There is a stairway on the outside of the building. You have to go outside and enter through a side door on a platform.

Q. Well, how many keys are there to the downstairs, specifically.

A. Originally there were three sets of keys for the downstairs. One set was locked inside; the other set I had; and the other set Mr. Salinas had.

Q. How many sets of keys were there to the upstairs?

A. Only two keys.

Q. Where were they?

(Testimony of Joseph Brantley.)

A. Mr. Salinas had one set of keys, and the other set was locked in the downstairs.

Q. Was it necessary then for you to go in the downstairs before you could go in the upstairs?

A. Yes, it was.

Q. Were you in that building any other time on the 25th of December?

A. Only when I was going to the fire, which was right at the turn-over of the 25th, approximately 11 to 11:15 p.m.

Q. When did you first hear of the fire?

A. It was about 11 o'clock. [24]

Q. How did you receive notice of the fire?

A. I had just come home from Fergusons. We ran a late movie, and I just entered my house, and a little girl by the name of Margie Lincoln came in, rushing in, and told me the restaurant was on fire.

Q. What did you do then?

A. I grabbed my jacket and headed for the restaurant.

Q. Would you describe what you did immediately after leaving the restaurant?

A. I could see from the outside smoke, and it was also coming out of the east end of the upstairs.

Q. The east end. What end is that in relation to the front of the building?

A. The building sets east and west, the beach running north and south almost.

Q. Would the east end be the rear end or the front end?

A. The east end would be the back end.

Q. What did you do after you saw this smoke?

(Testimony of Joseph Brantley.)

A. I entered the downstairs in order to get the key for the upstairs part.

Q. Do you know whether or not the downstairs door was locked?

A. Yes, it was locked; it was padlocked.

Q. How did you open it?

A. With my key.

Q. What did you do then?

A. I went into the downstairs part and got the key for the upstairs door. [25]

Q. Was there anyone with you, or were you alone at the time?

A. There was a lot of people around; I guess a couple did follow me into the downstairs—who, I couldn't say.

Q. What did you do after you removed the key?

A. Well, I got the key and went to the upstairs, and immediately to the scene of the fire and checked the rooms as I went down the hallway.

Q. How did you know where the scene of the fire was at that time?

A. Well, you could see it from the outside, and being downstairs there was no fire then. Going into the front end of the building, the front room part, you could see if there was a fire. As you go you could canvass the whole building in the matter of a minute.

Q. What did you see at the fire?

A. The first thing I saw was, I could see the fuses were all blown from shorting in the fire, causing the wires to short out. There were no lights, but

(Testimony of Joseph Brantley.)

the fire burning in the attic threw a light down into the room.

Q. What could you see in the room?

A. Well, I could see that the fire had been set for sure.

Mr. Crane: I object to that, that he "could see that the fire had been set * * *" It's improper; there is no evidence in this case that the fire had been set. It's a conclusion of the witness.

The Court: It's probably a conclusion. It wasn't responsive. He may describe what he saw, from which conclusions may be drawn.

Mr. Crane: At this time I am going to ask the Court to admonish this witness to not volunteer any more testimony.

The Court: Counsel has no right to instruct the witness; however, [26] it is proper to avoid volunteering information and answer only the questions which are put to you.

Q. (By Mr. Hermann): What did you see in that room, Mr. Brantley?

A. Underneath the attic, the hole that you go through into the attic, this chair was sitting directly underneath. There was a case or two of Sunnyboy jam, No. 10 cans they were, in cases that were sitting on top of the chair. There was another case alongside in order to make a kind of stepladder to obtain entrance.

Q. What else did you see?

A. There was this can of fuel called Blazo sitting beside the chair.

(Testimony of Joseph Brantley.)

Q. How far from the chair was the can of Blazo? A. Eight inches maybe.

Q. Would you describe the can of Blazo and the condition in which you found it?

A. The little plastic cap that covers it was missing, and the can had been almost used up. There was about a gallon of fuel left in the can.

Q. What did you do after entering the room, after you saw that?

A. Well, we started looking for anything that would hold water, to start working on the fire.

Q. Did you find anything of that nature?

A. Yes. We found a No. 10 tin that we used to start off first with. I knew the matter of speed would determine whether the building could be saved or not, and we got, I managed to get about two gallons of water out of the faucet in the upstairs part. [27]

Q. In what area of the building was the blaze at the time you first arrived?

Mr. Crane: No blaze has been testified to. He said he saw smoke coming out.

A. I think I said there was a light from the fire in the attic.

The Court: You may first describe what, if any place, you saw it.

Q. (By Mr. Hermann): Yes. What, if any place, did you see it?

A. Well, the whole attic was on fire in there and was rolling around in there. It couldn't get, or hadn't got the draft to really break through.

Q. What did it consist of? Smoke, flame or what?

(Testimony of Joseph Brantley.)

A. Well red flames and smoke and it was all congested in there.

Q. How much of the building did that area occupy, with the smoke and flames?

A. Two-thirds of the whole upstairs attic there, of that one particular room. Two-thirds of that room was burned.

Q. How large an area? Can you describe it in terms of feet? How wide and how long?

A. Well, I would say about 20 x 24, 20 x 24 feet.

Q. Where was the burned area in relation to the chair with the boxes and the Blazo can?

A. Almost directly overhead.

Mr. Crane: Overhead of what, if your Honor please. The answer is indefinite.

The Court: You may have the right to cross examine. [28]

Q. (By Mr. Hermann): What did you do then? After discovering this thing you have described, what did you do?

A. Well, we started to work on the fire, and we managed to get the two gallons of water out of this faucet. The water line downstairs had been frozen and caused a steam pressure in the hot water tank, and we could only get steam through the faucet.

Q. Were you able to extinguish the blaze?

A. Yes, we were able to extinguish it.

The Court: I couldn't hear your answer.

A. Yes, we extinguished the fire.

Q. (By Mr. Hermann): How long did it take to extinguish the fire?

(Testimony of Joseph Brantley.)

A. It took an hour or hour and a half, to the best of my knowledge, to get it under control where we could put the fire out. I think it must have been about two hours of work there, carrying the water out.

Q. Who fought this fire?

A. Well, it was a community affair. We started a bucket brigade from the lake, or the waterfront, and we used most of the water downstairs, the fresh water tanks, on the fire. There was men going until the fire was put out.

Q. Was anything used besides water to extinguish the blaze?

A. I used some extinguishers, but they were very poor, practically completely empty. They didn't do any good at all.

Q. What type of extinguishers, if you know?

A. They were CO-2 extinguishers.

Q. Do you know how many people were in this upstairs back room during [29] the course of the fire?

A. No, I couldn't tell you that—the excitement, you know, too much of a strain.

Q. Do you know whether there were several, or just a few?

A. There were several people there, quite a few at times. At times it was so crowded you could hardly place the water.

Q. Would you describe the entrance to the attic as you saw it when you arrived at the scene.

A. This chair was setting underneath the attic hole that you go through, and a couple of cases——

(Testimony of Joseph Brantley.)

Q. Would you speak a little louder please.

A. —a couple of cases of Sunnyboy jam in the chair.

Q. Would you just describe the entrance to the attic, please.

A. Just a hole about 18 x 24 inches.

Q. What did you see through that hole at the time of the fire?

A. Well, there you couldn't see too much inside, except the fire was going. There was a cord or rope or something hanging out of the hole. It kept getting in my way when I was putting water in the attic, and it seems as though I jerked it out of there.

Q. Is there any other entrance you know of to the attic, other than the entrance in that hole?

A. There is another entrance just before you go through the door into that room, at the entrance to the other room or overhead there.

Q. Is it possible to reach the area where the fire was from that entrance?

A. I think you could under normal conditions, but at the time of the fire, it [30] was impossible to get through because of the smoke. I tried to go through where I could get a better shot at the fire with the water, and I just got smoked out of there. I couldn't stay in there.

Q. Is the attic in one large room or is it in any way divided?

A. Basically, it is just one large attic but there has been a 2 x 8 or 2 x 6 partitioned off in that one area.

(Testimony of Joseph Brantley.)

Q. Where is that area in relation to the fire?

A. That is between the one entrance and the other.

Q. Then is it possible to go through the other entrance and reach the room where the fire was?

A. I think it would be; I think you could get over there when there was no fire going.

Q. Are there partitions between?

Mr. Crane: If your Honor please, I am going to object to the witness testifying to what he thinks. He has been up in the attic; he should know whether he could or couldn't get over there.

The Court: A witness may testify as to his observations. Have you read a recent decision of the Supreme Court, Mr. Crane, in which the Supreme Court has outlined quite at length the extent to which a lay witness may go in stating what might otherwise be considered an opinion, as to what his ordinary observations are.

Mr. Crane: That I quite agree with. I think I have had the decision recently in my office. What he saw I am not objecting to, but what he thinks I certainly am objecting to. He may think anything; he may have any kind of an opinion, and I object to what he or anybody [31] else thinks.

The Court: (To Witness) You should limit your testimony to what you saw or observed rather than what you think or guess.

Q. (By Mr. Hermann): Would you describe the partition in the attic.

(Testimony of Joseph Brantley.)

A. It is 2 x 6's and 2 x 8's. They are nailed on to these joists in there parallel, and there is an opening over the top. It was so dark in there—in that area when I was in there, I can't remember. Smoke too was in your eyes. I got into the opening about that far (indicating). I was trying to get the water over the top into the main fire.

Q. How does that partitioned area correspond to the room below it. Is it the same size? Smaller? Larger? A. It is larger.

Q. How much larger?

A. Well, just some 2 x 6's nailed across in the attic; the downstairs has a regular room partition.

Q. About what size is the attic portion where the fire was?

A. The attic where the fire was is the same as the room below it.

Q. By room below it, do you mean the room where the trap door was? A. Yes.

Q. While you were fighting this fire did you at any time see Steve Salinas?

A. Yes. Mr. Salinas came in approximately twenty minutes later, something like that.

Q. What, if anything, did he say at the time he came in? [32]

A. He asked me how we were doing and came over and looked up through the attic, and I told him I thought we had the fire put out, and he told me to let the fire go, that it had gone too far.

Mr. Crane: I object to that and ask that it be stricken; it's volunteered testimony.

(Testimony of Joseph Brantley.)

The Court: The answer was responsive to the question; objection overruled. He should lay a foundation, but that he is now attempting to do, show who was present. That was the last question asked. Who was present at the time?

Q. (By Mr. Hermann): Who was present at the time Mr. Salinas said that?

A. There is only one that I can be sure, or maybe two that was present. I think William Rexford was present, and Sammy Henry I think was present.

Q. Where were you at the time he made that remark?

A. Well, I was pretty busy. I was right underneath the trap door there.

Q. What, if anything, did Mr. Salinas do to fight the fire?

A. No aid was taken by Mr. Salinas.

Q. Would you speak a little louder please, when you answer the questions. How did he act at the fire?

A. There was no excitement; he was very calm. In fact I didn't see too much of him just right while I was busy there.

Q. About how long did he stay near the fire, if you know?

A. He stayed there I think until he went downstairs with me to start to work on thawing out these water pipes downstairs.

Q. Did you talk to Mr. Salinas at all again that night of the fire at the restaurant? [33]

(Testimony of Joseph Brantley.)

A. Yes. We had quite a talk. I explained the set up to him that was underneath the trap door, and told him that someone had set the fire in my opinion.

Q. What did he say at that time?

A. He said he thought so too; that he thought someone had set the fire.

Q. Was anything further said in regard to the fire by Mr. Salinas at that time?

A. Yes, there were considerable things, but I just don't seem to be able to remember too much.

Q. Did he indicate what action should be taken about the fire?

A. I told him I thought the fire had been set and that we should notify the United States Deputy Marshal.

Q. What did he say?

A. He asked me not to. He said since the fire had been set he thought we could catch the guy who did it ourselves.

Q. How was Mr. Salinas dressed the night of the fire?

A. I can't remember exactly. I think his clothes, I think they were dress clothes. He had his white shirt.

Q. What?

A. His white shirt, and a bow tie he had on.

Q. Do you recall what kind of footwear he was wearing?

A. Yes. I think he had a pair of U. S. Air Force sheeplined boots on.

(Testimony of Joseph Brantley.)

Q. What time was it the last you saw Mr. Salinas the night and early morning of the fire?

A. It was the next morning. I worked most of the night, in fact until [34] six o'clock in the morning cleaning up the place, and getting it cleaned up as he had wanted, and I was in bed. It was approximately ten o'clock and he came down and woke me up and told me it looked like someone had tampered in his room again and maybe the stove had blown up or something. He said there was soot all over the place.

Q. What did you do then?

A. He asked me if I would get up and go down and take care of it, and I told him "sure."

Q. Did you do that?

A. Yes. I got out of bed.

Q. Now while you worked at the Kotzebue Grill prior to the fire, did you ever at any time see a blazo can on the premises?

A. Yes. We kept blazo there for our blowtorches.

Q. Where was this blazo kept?

A. Well, as a rule, it was kept in the ice house—you know—a place where it would be safe.

Q. Did you ever use this can yourself?

A. Yes. I have used it a number of times.

Q. When was the last occasion you used it before the fire?

A. On or about the 18th or 20th I used the last of the Blazo in that can to fill up my blow torch.

Q. What do you mean by "that can"?

(Testimony of Joseph Brantley.)

A. Well later I found there was another can in the upstairs.

Q. When did you find that?

A. Well, it was sitting in the far end of the building, right near a stove. There was a stove in there but it wasn't used at the time. [35]

Q. Where was the can in relation to the room below the attic where the fire was?

A. It was sitting way against the wall and the hole in the attic was almost in the center of the room.

Q. When was the last time you used the blazo in that room?

A. The day before. It would be the 24th of December.

Q. What were you using the blazo for?

A. For thawing out your drain pipes for our sink downstairs. I filled up my blow torch.

Q. Did you notice how much was in the can at that time?

A. Yes. There was only two, maybe three, uses out of it for the torch. The torch holds about a quart.

Q. Do you know how much was in it in gallons, about how much?

A. Four gallons would just about be it.

Q. How large a container was it?

A. A five gallon can.

Q. Where did you leave that can on the day you used it on the 24th?

A. I left it in the back side of the room there.

(Testimony of Joseph Brantley.)

Q. Do you know of any other blazo cans in the Kotzebue Grill other than the empty one in the ice house and the one you have just described?

A. Yes. There is another can there that I found after the fire that I didn't know was there.

Q. Where did you find it?

A. In the far front end of the building.

Q. Whereabouts? [36]

A. In a little closet there. I think it had once been a closet.

Q. Do you know whether or not that can was full or partly empty?

A. Yes. It was full and sealed. The seal had never been broken on it.

Q. Had you ever seen that can prior to the fire?

A. No, I hadn't seen it.

Q. Now in the month of December, prior to this fire, do you know whether or not the Kotzebue Grill was doing a large business or a small business or what type of business?

Mr. Crane: That's incompetent, irrelevant, and immaterial, what business was going on, how much business they were doing. It is not an issue in this case.

The Court: It could quite conceivably be an issue. Objection overruled.

Mr. Crane: And the further objection, if your Honor please, if the witness knows.

The Court: Well, that's what he was asked; if he knows.

A. Yes, I know. We were doing a very slow

(Testimony of Joseph Brantley.)

business. I don't think we were even holding our own.

Q. (By Mr. Hermann): Now in your capacity as a cook, do you have any knowledge of the amount of supplies on hand at the Kotzebue Grill on the 25th of December?

A. Yes. I know what supplies we had.

Q. How many supplies were on hand in relation to the normal amount customarily kept on hand?

A. We had no shortage in meat except hamburger meat. We were running a [37] great shortage in hamburger, and fresh vegetables like lettuce, tomatoes and carrots and celery, things like we normally have to have most every day.

Q. Do you know whether or not anything of that nature had been ordered by anyone at the Kotzebue Grill?

A. Orders were sent in to Mr. Salinas.

Q. On what date were those orders sent in?

A. Around the first part of December; the exact date I can't remember.

Q. Had those supplies arrived by the 25th?

A. No. They had not arrived.

Q. Did you take any action yourself in relation to the ordering of those supplies?

A. I asked Mr. Salinas about it, if he had ordered them and he said that he had, that they had been ordered. And we kept waiting, and as a rule it takes about a week and a week and a half for supplies to get there, and three weeks or so had elapsed and we were late sending the order in, and so we were running short.

(Testimony of Joseph Brantley.)

Q. Do you know whether or not he did order those supplies?

A. In checking with Alaska Communications System, I found that no orders had been sent in for the month of December, no orders at all.

Mr. Crane: If your Honor please, I ask that that be stricken. It's strictly hearsay. He says he checked with Alaska Communications System.

The Court: And found that no orders had been sent in. You mean that you checked the records?

A. Yes. [38]

The Court: That's what I understood him to say.

Mr. Crane: What right has he got to check the records of ACS?

The Court: If your objection is that his testimony is not the best evidence, probably your objection is a valid one, but not that it is hearsay. Objection sustained on that basis.

Mr. Hermann: His evidence is to the effect that there were no records of the orders, so there would be no issue.

The Court: I haven't heard any such evidence. Oh, yes. I see. We have the question then of whether the records are the best evidence if there are no records.

Mr. Crane: If your Honor please——

The Court: Just a minute now——

Mr. Crane: If your Honor please, he said he checked the records of ACS, and in the first place he has no business checking their records.

The Court: That has no concern with your objection to this testimony.

(Testimony of Joseph Brantley.)

Mr. Crane: If he checked the records, the records are the best evidence. I want to see the records he checked.

The Court: Upon the grounds that the records would be the best evidence the objection must be sustained.

Q. (By Mr. Hermann): Do you know whether or not these supplies ever, in fact, arrived?

A. No, they didn't arrive. [39]

Q. They never arrived?

A. No, they didn't.

Q. If they had been ordered they would have arrived after the fire?

A. Yes, after we closed. But we never received such an order.

Q. Was there a shortage of anything else besides hamburger and fresh stuff?

A. Our fuel oil was running low in our tank.

Q. Do you know whether or not any fuel oil had been ordered for the tank?

A. Yes, fuel oil had been ordered. Esther Ipa-look and myself ordered the oil.

Q. What date was that?

A. It was around the 21st or 22nd of December. And even earlier we had ordered it. I thought we were running on a shoe string.

Q. Who ordered it? Mr. Salinas or yourself?

A. Yes, the order was turned over to Mr. Salinas and at that time he said he would order it or have Charlie Wilson order it.

(Testimony of Joseph Brantley.)

Mr. Crane: Who was that last? Who ordered it?

A. Charlie Wilson.

Q. What date was the order turned over to him?

A. I can't remember. I was along the last part of the month. It was turned in to him two or three times.

Q. To Mr. Salinas? A. Yes.

Q. Did that oil requested of him arrive at all, to your knowledge? [40]

A. No. We had asked him about it and he said he had ordered the oil, and Esther made a special trip—Esther Ipalook—to Standard Oil to check on it, and no oil had been ordered.

Mr. Hermann: Well, that is not relevant.

Mr. Crane: I move we strike that as not responsive—as to what Esther Ipalook may have told him.

The Court: The answer may be stricken and the jury instructed to disregard anything as to what somebody told him.

Mr. Hermann: What I understood you to say that Esther Ipalook told you, that is not proper.

The Court: The jury may disregard it.

Q. (By Mr. Hermann): Now how long did Mr. Salinas remain in Kotzebue after the fire to your knowledge?

Mr. Crane: That is objected to, if the Court please, as immaterial how long the man remained in town after the fire.

The Court: Overruled. He may answer.

A. One day.

Q. (By Mr. Hermann): One day?

(Testimony of Joseph Brantley.)

A. Yes.

Q. Do you know the day he left?

A. December 27.

Q. What was the date of the fire then?

A. December 25. [41]

A. I see. Had he ever, prior to that, in any way notified you that he had been leaving, that he was going to leave?

Mr. Crane: Objected to as incompetent, irrelevant and immaterial, what he notified him, what the man's intention was, what he was going to do in the future. It is not competent evidence.

The Court: Overruled.

Q. (By Mr. Hermann): Had he ever previously notified you he was going to leave?

A. Yes, he said he was going to leave. I didn't know the exact date, but I knew he was going on vacation.

Q. Did he ever at any time tell you what date or approximately the date he was going on vacation?

A. No. I knew it would be in December sometime, but I didn't know when.

Q. Now when Mr. Salinas left, who was in charge of the building after that, if you know?

A. Well, I was the one that was left in charge. I had the keys to the place and he gave me the final instructions.

Q. What type of instructions did he give you?

A. Well, about the interior decorating of the dining room and things that needed to be done, like a new firebox in the cookstove.

(Testimony of Joseph Brantley.)

The Court: It would be convenient at this time to take a recess for ten minutes.

(Thereupon, at 11:00 a.m. the Court duly instructed the jury and a ten minute recess was taken.) [42]

After Recess

(All persons necessary being again present, court reconvened and the trial of this cause was resumed. Both counsel stipulated that the jury were all present.)

The Court: Very well. You may proceed with the examination of the witness.

(The witness on the stand at the time of recess resumed the stand for further direct examination.)

Mr. Hermann: I would like to have this exhibit marked for identification purposes. It consists of five photographs.

Mr. Crane: Are those the ones, Mr. Hermann, that I stipulated to?

Mr. Hermann: These are the ones taken by Mr. Land, the polaroid photographs. You have seen them. These are exterior shots.

Mr. Crane: Might I inquire, is Mr. Land going to be a witness here?

Mr. Hermann: No.

Mr. Crane: They haven't been offered yet?

The Court: They may be marked as plaintiff's Exhibit A for identification.

(A series of five photographs is marked as

(Testimony of Joseph Brantley.)

plaintiff's Exhibit A-1, A-2, A-3, A-4, A-5, for identification.) [43]

Q. (By Mr. Hermann): Mr. Brantley, I hand you plaintiff's Exhibit A for identification and ask you if you have seen this before?

A. Yes, I have seen them.

Q. When was the first time you have seen those?

A. In Kotzebue. The date was in January, I think. I can't remember the date.

Q. Do you know about what part of January it was?

A. Around the last part I think, the last part of January.

Q. Where did you see them on that occasion?

A. I saw Mr. Land take these shots.

Q. What kind of a camera were they taken with? A. A Polaroid camera.

Q. Did you see the photographs as they came from the camera? A. Yes.

Q. Do those appear to be the same photographs you saw from the camera?

A. Yes, they are the ones.

Q. What are those photographs of?

Mr. Crane: That's objected to, if your Honor please, to showing at this time what the photographs are of. He said he was present when they were taken with a certain type of camera, but proper foundation has not been laid for introducing them in evidence. It is not proper for him to testify to what they are at this time.

The Court: On the contrary, it would not be

(Testimony of Joseph Brantley.)

proper to offer them in evidence unless he first testified as to what they are. [44]

Q. (By Mr. Hermann): What are those photographs of?

A. The exterior part of the Kotzebue Grill.

Q. I hand you plaintiff's Exhibit A-1 for identification and ask you what view that is of the Kotzebue Grill?

A. That is the front end of the building, the west end facing the waterfront, the main entrance to the restaurant.

Q. Can you tell whether or not that is the way the building actually appears?

Mr. Crane: And the further objection, if your Honor please, that this is just a roundabout way of getting into evidence the description of what they are and putting before the jury what they are.

The Court: It certainly must be shown what they are. Objection overruled.

Q. (By Mr. Hermann): Can you tell whether or not that is the way the building actually appears from that view?

A. Yes. That is the way it looks from the front.

Q. Do you notice any distortion or other things which would make the picture inaccurate?

A. No. I see nothing.

Q. I hand you plaintiff's Exhibit A-2 for identification and ask you what that is a photograph of?

A. That's the south side of the building. There's a little storm shed there that you go into, into the kitchen part, the kitchen part of the restaurant.

(Testimony of Joseph Brantley.)

Q. Can you tell whether or not that is how that actually appears to a person standing in such a position? A. Yes.

Q. Do you notice any distortion or irregularities in the photograph?

A. No. I see nothing.

Q. I hand you plaintiff's Exhibit A-3 for identification and ask you what the view is of that building?

A. That's the north side of the building where our fuel tanks are located.

Q. Can you state whether or not that is how the building actually appears to a person standing in that direction to the building?

A. Yes. That is the way it is.

Q. Do you notice any irregularities or distortion in the picture? A. Nothing.

Q. I hand you plaintiff's Exhibit A-4 and ask if you recognize that? What angle was that taken from?

A. That is the east end of the building where they have the ice shed, and the upstairs addition where the fire was.

Q. Can you state whether or not that is how the building appears from that angle? A. Yes.

Q. Do you notice any irregularities or distortion in the picture? A. No. Nothing.

Q. I hand you plaintiff's Exhibit A-5 and ask you what is that a picture of? [46]

A. That shows a portion of the stairway, and the upstairs platform for the upstairs entrance into

(Testimony of Joseph Brantley.)

the building. That is the south side of the building.

Q. Is that how the building actually appears to a person standing in that angle? A. Yes.

Q. Do you notice any irregularities or distortion in the picture? A. No.

Mr. Hermann: At this time I would like to offer plaintiff's Exhibit A-1 through A-5 into evidence.

Mr. Crane: Objected to, if your Honor please because proper foundation has not been laid. The man is available who took the pictures. He should be called if he is the photographer. Certainly this man has not qualified himself. He said he was present when the man took the pictures with a Polaroid camera and is not the best evidence, and foundation has not been laid.

The Court: I have always held, and I think correctly, that if pictures or photographs are offered in evidence and properly identified as to the substance of the picture and the time of taking of them, that the photographer who took them need not be called. I think that is correct. Objection overruled. The photographs may be received in evidence.

Mr. Crane: The further objection, your Honor, there is no time set as to when the pictures were taken. Further there is a stipulation between the United States Attorney and I that he could [47] use my photographs and I could use his.

The Court: I am aware of no such stipulation counsel. As far as the time is concerned, it could

(Testimony of Joseph Brantley.)

possibly be fixed a little more accurately, but the witness says early in January. I think that is sufficient. The photographs may be received.

(Plaintiff's Exhibit A-1, A-2, A-3, A-4 and A-5, are received in evidence.)

Q. (By Mr. Hermann): Now, Mr. Brantley, are you able to point out in any of these photographs the place where the fire was discovered to be?

A. Yes. The fire was discovered in this part up here (indicating).

Mr. Taylor: Just a minute, your Honor, we are going to object to any testimony unless the witness refers to it by exhibit number so we will know.

The Court: Yes. That should be done.

Q. (By Mr. Hermann): Will you please refer to the exhibit number on the back.

A. It's Exhibit A-2.

Q. Would you hold it so the jury could see it and point to the place of origin of the fire.

(The witness holds up the exhibit and indicates.)

A. Should I walk up a little closer?

Q. Just hold it up. [48]

A. In this area (indicating), and up in the attic part of the building.

Mr. Hermann: I would like to hand the exhibit to the jury.

Mr. Crane: Could we see the exhibit, Mr. Hermann, please.

(The exhibit is handed to Mr. Taylor.)

(Testimony of Joseph Brantley.)

Mr. Taylor: We would object to the use of this in connection with the testimony of this witness because this shows the outside of the building, your Honor. There is no testimony that any fire occurred in the outside of the building.

The Court: That objection would go to the weight rather than the competency of the question and answer. Objection overruled. However, for purpose of clarity some identifying mark should be made on the photograph by the witness to show the place that he has pointed out. How about putting an X on there.

Q. (By Mr. Hermann): Would you put an X on the area, including the room where the fire was located.

(The witness marks the exhibit.)

Q. Perhaps if you put an arrow on the sky portion——

Mr. Taylor: Did you say to put an "L" on the side of it?

Mr. Hermann: I said to put an arrow.

The Court: The photograph may be shown to the jury.

(The photograph is handed to the jury.)

Q. (By Mr. Hermann): Mr. Brantley, would you state whether or not the door which you first entered the premises, after you were first notified of the fire, is shown on [49] any of those photographs, and tell which photograph, if any, that door is indicated on?

A. Yes. This door (indicating).

(Testimony of Joseph Brantley.)

Q. What is the number of that picture?

A. This is Exhibit 4-A.

Mr. Hermann: I would like permission to show Exhibit 4-A to the jury.

The Court: Would you also please ask the witness to identify with some mark—is there only one door shown?

Mr. Hermann: Yes.

The Court: Still, it should be marked.

Q. (By Mr. Hermann): Would you put an X on the door.

(The witness marks the photograph and it is then handed to Mr. Taylor.)

Q. Mr. Brantley, would you please state whether or not the door to the upstairs by which you entered the upstairs the night of the fire is indicated and give us the number of that picture, if there is one.

A. This is Exhibit 3-A.

Q. Would you place the letter Y on that door.

Mr. Taylor: Why Y?

Mr. Hermann: The other one was an X and I don't want to confuse them.

The Court: He may have them marked any way he desires.

(The exhibit is then shown to Mr. Taylor and Mr. Crane.) [50]

Mr. Taylor: No objection.

(Both photographs are then handed to the jury.)

Mr. Hermann: I would like to present A-1 and A-5 to the jury without further comment.

(Testimony of Joseph Brantley.)

Mr. Taylor: Just a minute, your Honor. I am going to object to the self-serving declarations written on the back of them without consent of court or counsel.

The Court: On all of them?

Mr. Taylor: All of them.

The Court: There does appear to be some writing on the backs of each of these to which the attention of the Court has not been called until now, and the witness should be asked to explain this writing.

Q. (By Mr. Hermann): Mr. Brantley, are you aware of the writing on the backs of the photographs? A. No. I didn't—I never——

Mr. Hermann: We have no objection to the writing being on. We attach no attention to it.

The Court: Do you know whose handwriting that is, Mr. Brantley?

A. No, sir. I couldn't be sure about the handwriting.

The Court: It is not yours? A. No, sir.

Mr. Taylor: We move, your Honor, that the Exhibit be withdrawn from the jury. [51]

The Court: Well, unless the handwriting can be identified, the exhibit should be withdrawn and the writing obliterated.

Mr. Herman: Yes. Would it be better to have the Clerk do it? At the same time, if your Honor please, I thought it might be possible, whoever did the writing, the man, if he was here——

The Court: Objection has been made to this writ-

(Testimony of Joseph Brantley.)

ing and as long as objection has been made we will obliterate it. Mr. Clerk will you please do that. (To the jury). These exhibits, on account of these objections, would you hand them up just now. We have to take off some matter which appears on the backs.

(The exhibits are handed to the Clerk.)

The Court: You may proceed.

Q. (By Mr. Hermann): Mr. Brantley, to your knowledge was any inspection made of the premises after the fire by law enforcement officers?

Mr. Crane: I didn't get the question entirely.

(The Reporter reads the previous question as follows: "Mr. Brantley, to your knowledge was any inspection made of the premises after the fire by law enforcement officers?")

A. Yes, there was an investigation.

Q. Who made the investigation?

A. Mr. Archie Adirim, United States Deputy Marshal, Kotzebue.

Q. Any others?

A. You mean the total time elapsed after the fire?

A. At any time after the fire. [52]

A. There was the OSI, I think, went through there. I think that's what they were, OSI arson squad man.

Q. What was his name, please?

A. I can't quite remember his name.

Q. How did these people gain entrance to the building? A. I let them in.

(Testimony of Joseph Brantley.)

Q. Do you know whether or not they took anything from the building?

A. Yes. They took just things that were necessary.

Mr. Crane: If your Honor please, I would object to that—what things were necessary. Let him testify to what articles they took, if he knows.

The Court: That is correct. You may state what articles were taken, not your judgment of what were necessary.

A. They took a sample of the sawdust insulation that lays in the attic. They took four rings that appeared to me to have come from ice cream containers. They took one egg-shaped object that looked like the bottom of a waste basket. They took one cord, an insulated cord. And they took one igniter, I guess you would call it an igniter, that comes out of a soldering iron.

Q. (By Mr. Hermann): Do you know where they took each of these items from?

A. From the attic, from the attic area in which the fire started.

Q. Do you know whether or not they were given permission to take these?

A. Yes. I gave them permission to take the items.

Q. Did you give them permission orally or in writing?

A. Well, orally. [53]

Q. And do you know on how many occasions they visited the attic or upstairs?

A. No, not the exact number. There were some

(Testimony of Joseph Brantley.)

visits I didn't keep track of.

Q. Were you present on each of these visits?

A. Each time I let them in the building.

Q. Now after the fire did you make any examination of the building yourself?

A. No, I didn't examine it myself.

Q. Have you been through the building since the fire? A. Yes.

Q. Have you noticed any indications of any breaking into the building or anything of that nature?

A. No. There was no forced entrance to the building.

Q. What type of windows does the upstairs of the grill have?

A. They have regular glass and frame windows.

Q. Do you know whether they are the type of windows that open and close or not?

A. No. They are stationary; they do not open.

Q. Would you describe the metal hoops you have mentioned.

A. They are just circular, about; they are crimped tin metal in a round circle that would fit over a gallon container.

Q. What type of gallon container?

A. Where I saw them at was on ice cream containers.

Q. Do you know whether or not there were any such ice cream containers [54] in the Kotzebue Grill before the fire?

A. Yes. We had ice cream there with one-gallon containers.

(Testimony of Joseph Brantley.)

Q. Do you know how many there were?

A. No, I don't know. We had a lot of them that had ice cream in them, and we had three or four that I think were empty.

Q. Do you know whether or not there were any waste paper baskets in the Kotzebue Grill before the fire?

A. Yes, there were waste paper baskets.

Q. How many were there?

Mr. Crane: If your Honor please, at this time I am going to object to this testimony, of him continuing to testify about these articles. If they are available they should be brought into court at this time.

The Court: The witness is apparently identifying the articles that were taken and as long as he is describing those which were taken I find no objection to it. Overruled.

A. To my knowledge there were two, maybe three—I am not real sure about the amount of baskets there were.

Q. (By Mr. Hermann): Well, when you say two or three, do you refer to empty or full containers. A. The waste paper baskets.

Q. Waste paper baskets?

A. Yes. Two or three of them.

Q. Have you seen any since the fire?

A. Yes. In Mr. Salinas' room, and I think one was in Charlie Norton's room. [55]

Mr. Taylor: Will you talk a little louder, please, so we can hear you?

(Testimony of Joseph Brantley.)

A. Would you like for me to repeat it?

Mr. Taylor: Yes, if you will.

A. There was one waste basket in Mr. Salinas' room, and there was one in Charlie Norton's room. That was the room across.

Mr. Taylor: Let me stand up and would you repeat it again a little louder, if you will.

A. There was wastebasket in Mr. Salinas' room and there was a waste basket in Charlie Norton's room.

Mr. Taylor: Did they take both of those?

The Court: You may have an opportunity to cross examine at the proper time. Also, I am going to ask both counsel to stand during the examination of this witness.

Mr. Taylor: When I am sitting down here I cannot hear him——

The Court: Well, you may ask the witness to speak up, and you should not stand while the other counsel is examining the witness, both you and Mr. Crane. It is too distracting.

Mr. Taylor: I only did that for the purpose of trying to hear.

Q. (By Mr. Hermann): Mr. Brantley, do you know whether or not there was a waste basket in each of those rooms after the fire?

A. Yes. There was one in each room.

Q. Were there any other waste baskets in the building before the fire, other than in each of those two rooms? [56]

A. I couldn't answer for sure; I couldn't say for sure.

(Testimony of Joseph Brantley.)

Q. Could you state whether or not the portion removed from the attic in any way resembled the waste baskets in those two rooms? A. Yes.

Mr. Crane: Objected to, if your Honor please, to if they resemble something——

The Court: Objection overruled. Again, it's purely a matter of observation, and that's not opinion.

A. Yes, it resembled the waste basket that was in Mr. Salinas' room. It was the same shaped bottom about.

Q. (By Mr. Hermann): Do you know where the sawdust was taken from?

A. Yes. It was taken——

Mr. Crane: What sawdust, your Honor?

The Court: He testified to some samples of sawdust being taken by the inspector. The question is, where was it taken from?

Mr. Crane: I stand corrected, your Honor.

A. They were taken from within 18 to 20 inches of the opening of the entrance to the attic, adjacent to that portion of the area there.

Q. Do you know how much was taken?

A. Well,——

The Court: Counsel, must you stand? If you can't hear well, perhaps we had better readjust the tables here somehow.

Mr. Crane: I am sorry, your Honor. May I have the last question read.

(The reporter then reads the previous question as follows: [57] "Do you know how much was taken?")

(Testimony of Joseph Brantley.)

Mr. Crane: If your Honor please, I am going to renew my objection to the witness testifying about the quantity and quality of these articles until they are first introduced and offered into evidence. Let them be brought into court and identified. He says this was taken and that was taken, and it is getting to be a long record——

The Court: On the contrary; and say the articles were brought in and not identified——

Mr. Crane: I thought he could identify them if they were brought in.

The Court: Objection overruled.

Q. (By Mr. Hermann): How large a quantity of sawdust was taken, if you know.

A. Approximately a pint or so for laboratory tests.

Q. Do you know how much sawdust there was in that attic?

A. Yes. This attic was insulated with sawdust, the entire attic.

Q. How thick, if you know, was the sawdust in the attic?

A. About an inch or inch and a half thick.

Q. Exactly where were you when the sawdust was removed from the attic?

A. I was present right under the attic hole. The officers were inside.

Q. Could you please state whether or not you noticed any odors at that time?

A. Yes. You could smell the gas in the sawdust. I was asked to take a smell of it, and it was very strong. [58]

(Testimony of Joseph Brantley.)

Q. I see. No further questions.

The Court: You may cross examine. You may cross examine, counsel.

Mr. Crane: Excuse me. Does your Honor wish me to start?

The Court: I think we could use the rest of the time before noon.

Mr. Crane: Very well.

The Court: Yes. It is not yet quite time for recess.

Cross Examination

Q. (By Mr. Crane): Mr. Brantley, how long have you lived in the Kotzebue area?

A. Two years. It will be two years this summer.

Q. Prior to that, where did you reside?

A. Lansing, Michigan.

Q. What has been your occupation since coming to Alaska?

A. I worked in an automobile factory.

Q. Since coming to Alaska?

A. Since coming to Alaska. I worked for Wien Airlines since I was here.

Q. Where did you work for Wien Airlines?

A. Kotzebue Station.

Q. For how long? A. For one year..

Q. After that what did you do? Did you terminate your employment with Wien? A. Yes.

Q. After that what did you do? [59]

A. Well, from that time I just worked part time work. I worked for the Bureau of Land Manage-

(Testimony of Joseph Brantley.)

ment and I worked for Alaska Airlines a little, part time, and I worked for Western Electric.

Q. Who else? A. Mr. Salinas.

Q. Between the time you left the Airlines then, you held the three other jobs before you went to work for Mr. Salinas? Is that correct?

A. Yes.

Q. Now let me get this again? What date did you go to work for Mr. Salinas?

A. It was on November 17. I can't be sure of that date but I think that's it?

Q. And you worked in steady employment for Mr. Salinas up to the time of this fire on Christmas day? A. Yes, that's right.

Q. And then after the fire you continued on as manager and custodian and so forth of the place?

A. That's true.

Q. For Mr. Salinas? A. Yes.

Q. You had full charge and had the keys of the place from the time Mr. Salinas left for his trip Outside until he returned?

A. No, I turned them over to him.

Q. Your employment at this time has ceased as far as you and Mr. Salinas are concerned? [60]

A. That's as of the date I turned the keys over to him.

Q. What I am getting at, you are not now the employee of Mr. Salinas? A. No.

Q. But you were up until what date?

A. Until the date he returned.

Q. Do you know approximately that date? A

(Testimony of Joseph Brantley.)

week ago, two weeks ago, a month ago? Do you mean when he returned from his vacation?

A. When he returned the first time from Outside.

Q. That was probably a month or so ago? Would that be about right? A. Yes.

Q. Now, Mr. Brantley, coming down to Christmas Eve—that would be the day before the fire—were you working in the place that day?

A. No.

Q. Who was working there?

A. No one. It was Christmas Day.

Q. I said Christmas Eve.

A. Yes, I worked Christmas Eve.

Q. I will make it more definite. On the 24th, which would be the day before Christmas, what time did you go to work that day?

A. At 7:00 a.m.

Q. And you worked until what time?

A. 4.00 p.m.

Q. Who relieved you on your shift at 4:00 p.m.?

A. Esther Ipalook. She comes to work at 11:00, and then I go after the dinner meal is prepared.

Q. What I am getting at, Mr. Brantley, is this: when Mr. Salinas was away from the restaurant, you were the one in charge, were you not?

A. Yes. Well, I wasn't fully in charge so long as he was there. I wasn't put in charge until after he left; the day before he left he gave me my instructions.

Q. Well, now, coming back to the day prior to

(Testimony of Joseph Brantley.)

the fire, what I am trying to do is place who all was there; what help did you have? Were you cooking alone or did you have assistance in there?

A. I cooked alone until 11:00; then I had help come in at 11:00.

Q. Who was that help?

A. Esther Ipalook, Meta Sheldon, and Dolly Wilson I think was working.

Q. Dolly Wilson was working there on the 24th, was she? A. I think she was there.

Q. What were her duties?

A. Waitress. She did waitress work and washed dishes and cleaned the place up.

Q. And she came to work at 11:00 and Esther Ipalook came on at 11:00—now they worked until what time? A. Until the place closed.

Q. Now who relieved you from cooking at 4:00 o'clock? A. Esther.

Q. All right. Now, if you know, who closed—first, I will ask you what time on the 24th was the place closed for business?

A. At 8:00 o'clock.

Q. At 8:00 o'clock? A. Yes. [62]

Q. Now who was in charge of the place at the time that the restaurant was closed at 8:00 o'clock? On the 24th. A. Esther Ipalook.

Q. Esther Ipalook. Who else was working there at that particular time? A. Charlie Wilson.

Q. Now you mentioned Charlie Wilson—Do you mean Dolly Wilson?

A. I mean Dolly and Charlie both worked there,

(Testimony of Joseph Brantley.)

but Charlie didn't come in until night.

Q. What was Charlie Wilson's duty?

A. He cleaned the place up, emptied the garbage cans, cleaned the upstairs also; took care of the place in that respect.

Q. Now Charlie Wilson acted as janitor, and Charlie cleaned both the downstairs and upstairs?

A. Yes, that's true.

Q. All right. Who else, from 4:00 o'clock on the 24th until closing time, had access to the upstairs— Does your Honor have something—

The Court: We may take the noon recess at this time and recess this case until 2:00 o'clock.

(Thereupon the Court duly admonished the jury and the regular noon recess was taken.)

After Recess

(At 2:00 p.m. court reconvened and the trial of this cause was resumed. The jurors present returned to the jury box, and the witness on the stand at the time of recess resumed the stand for further cross examination.) [63]

The Court: Defendant and all counsel are present, but one juror appears to be absent. The bailiff is trying to get him on the phone just now so we will wait just a minute.

While we are waiting counsel, there was no motion to exclude witnesses. Are you excluding them?

Mr. Hermann: I have instructed them to exclude all witnesses and as far as I know none have been present.

(Testimony of Joseph Brantley.)

Mr. Crane: I am not too particular about it.

The Court: Well, it is generally best until after they have testified. Mr. Levine, you might call the hospital. Possibly some accident has befallen him. He is usually pretty prompt.

(There is some further discussion with reference to locating the missing juror.)

The Court: We might as well recess a little bit, or the jury may be excused and the witness may be excused. We will wait a little while longer. The jury may be excused for a few minutes until we try to locate the missing juror.

(The jury retired and the witness left the stand.)

The Court: While the jury are not present, counsel, it occurred to me this morning there are one or two adjustments we will need to make to our calendar.

(There then followed a short discussion by Court and counsel of calendar adjustments not related to the matter on trial.)

(Juror Seelkoke appears in the court room and the jury is [64] recalled. The witness resumes the stand.)

Juror Seelkoke: I am sorry. I was lying down a little bit and went to sleep.

The Court: We were afraid something might have happened to you and asked the Deputy Marshal to call the hospital for us.

Well, the jury now appear to be all present.

(Both counsel so stipulate.)

(Testimony of Joseph Brantley.)

Q. (By Mr. Crane): Mr. Brantley. I believe where I left off before noon recess was asking you who was employed on the 24th and 25th in the Kotzebue Grill at Kotzebue. I believe we got down to Charlie Wilson. What were Charlie Wilson's duties and what time did he come to work?

A. He came to work about 6:00 o'clock. He was clean up man. He cleaned the stoves up and the upstairs. That was about the extent of his duties.

Q. Now have you named all of the employees that was there on those dates as far as you know.

A. Meta Sheldon?

Q. Now did all of these employees of the Kotzebue Grill have free access to both the upstairs and downstairs of the building, the entire building, at all times? A. No.

Q. I mean while they were employed there.

A. No.

Q. All right. During their employment, who had access to the upstairs?

A. The upstairs key was hung on a nail downstairs for the upstairs use during the day. [65]

Q. Who could use that key?

A. Anyone there during the day.

Q. Then anybody had access to the upstairs?

A. But not to the full access to the whole building.

Q. What do you mean?

A. They didn't have access to the keys to the downstairs area.

Q. No. But anybody working in the building

(Testimony of Joseph Brantley.)

who was employed in the restaurant part or in the kitchen, or was employed during the day or early evening in the Kotzebue Grill could, at any time, pick up the key and go upstairs if they had any occasion to? Is that right? No restrictions on them? A. No.

Q. Now let's start with the Kotzebue Grill building. You say it was a two-story building?

A. Yes.

Q. Does it have a basement? A. Yes.

Q. What is in the basement?

A. There is a well where we get our water supply from for washing dishes, and just the line going into the well. The pump is on the first floor.

Q. What else, if anything? A. That's all.

Q. Are any commodities stored there?

A. No. [66]

Q. Is there any fuel oil there? A. No.

Q. Any gasoline? A. No.

Q. Let's come to the next floor then, which would be the main floor of the building. What is on the main floor of the building? Now I mean by that the restaurant part, the part the public has access to first.

A. It has a horse-shoe counter shaped, and has a juke box, and has some ice cream machines and freezers that haven't been in use. It has the pie shelves and it has a cash register and what dishes and things are stored on the shelves and on the bar and counter.

Q. You mentioned there are ice cream freezers

(Testimony of Joseph Brantley.)

not being in use. Are they not in use on account of faulty electric current into them?

A. I didn't understand it that way. I understand they were not in use on account of the high rate of electricity that they consumed.

Q. Do you know whether or not if you turned them on it would short the electricity in the building? A. No, I don't know that.

Q. Never tried to find out? A. No.

Q. Let's go from the restaurant part in the kitchen. What is in the kitchen?

A. A large oil range, two refrigerators, a shelf-type freezer, and they have the necessary arrangements for tables and shelves and things that are there. They have a deep fat fryer, toaster, electric fans that operate the motor of [67] the stove, and also for draft, and they have a kind of canopy covering for the stove, for the top.

Q. What are the conditions of the floor in that restaurant, especially around the stove area? Isn't it a fact that it's very much oil-soaked around and under the areas and under the stove part of the building and has been for years?

A. Yes, I would say it's considerably soaked with oil, yes.

Q. Now, let's go back to the building behind, directly behind the kitchen. How was it connected?

A. There is a hallway from the kitchen back. It has a motor back there for the deep freeze unit. And it is used for hanging coats and a little smoking room. It has a line running through there.

(Testimony of Joseph Brantley.)

Q. You say there is a motor in there. Was that motor in operating condition, if you know?

A. Now I am not sure whether it's a motor or a part of a unit for the deep freezer. I think the motor sits in there and part of the freezing unit is in there, the pipe line running to the deep freezer.

Q. Where is the deep freezer?

A. You have to go through the cooler and then to the side of that is one big room split in the middle.

Q. What electric equipment is in the deep freeze, if anything?

A. Just an electric light I think.

Q. Just a light? A. Uh-hum.

Q. Now we have the ground floor covered. Now to go from the first story [68] to the second story, just explain to the jury what you have to do to get upstairs?

A. First you have to take the key that is hanging on the nail there, and you have to go outside of the building around to the side, and up the stairway to a platform, and enter through a side door that you go into the upstairs.

Q. All right. Now when you get upstairs, when you go in the upstairs door, what is directly in front of you? What kind of a room do you go into?

A. Just one large room, almost the size of this room, when you walk into it.

Q. That room is used primarily for what purpose?

(Testimony of Joseph Brantley.)

A. It has filing cabinets and the office work is right there, and he has some of his commodities stored in there, and a washing machine. They do the laundry there for the restaurant, wash clothes.

Q. Now coming back to the office in this room, you go into what next? A. A hallway.

Q. That hallway is between what?

A. The hallway runs between the two large rooms; then partitions and rooms on each side as you go down the hallway.

Q. Now you say the hallway runs between the two large rooms. What do you mean by two large rooms?

A. Well the west end of the building has a very large room and the east end of the building has a large room.

Q. What is between those two rooms?

A. There is two bedrooms, and one small room, that isn't occupied, and then a little den in there they use for storing.

Q. Isn't there a washroom and toilet up above and opposite the rooms?

A. The washroom and toilet are just above the kitchen.

Q. Now who occupied these two bedrooms on the 23rd and 24th of January, 1957?

A. You mean during the nighttime?

The Court: Do you mean January?

Mr. Crane: I mean December.

A. No one occupied them fully during the day and night. They were used——

(Testimony of Joseph Brantley.)

Q. I mean who occupied them? Did anybody occupy them and if so, who?

A. Mr. Salinas partly occupied one of the rooms, his bedroom.

Q. What do you mean "partly occupied"?

A. Well, he didn't stay there during the night; he stayed at Rotman's.

Q. Did anybody sleep in the building during the 23rd, 24th or 25th? A. No.

Q. Had anybody slept there for a week before?

A. Not that I know of.

Q. Had anybody slept there for a month before?

A. Not that I know of.

Q. Had anybody slept there for two months before? A. That I don't know.

Q. Then it hadn't been used for sleeping quarters or dwelling quarters, had it?

A. Not recently. Mr. Charlie Norton occupied one room, and just how long before I went to work it was that he left I don't know. [70]

Q. But he did leave the premises and vacate them, abandon them, prior to your going to work for Steve Salinas?

Mr. Hermann: If your Honor please, I object to the form of the question.

The Court: It's cross examination and leading questions are proper on cross examination. Objection overruled.

A. Yes, he did.

Q. (By Mr. Crane): What date did you go to work for Steve Salinas?

(Testimony of Joseph Brantley.)

A. Around or about the 17th of November.

Q. All right. From the 17th of November up to and including the 25th of December, 1957, this place was not used as a dwelling house then? Is that your testimony?

A. That's right. It wasn't.

Q. That is correct. Now you stated on—if your Honor will pardon me a minute now—Now coming to the 23rd day of December, 1957, which is the day preceding the fire, you stated, as I recall, on direct examination, that you worked until four o'clock. Did you return to the building after your working hours, later in the evening of the 23rd?

A. It's very possible that I did. I can't remember for sure because I have went in there several times after my working hours.

Q. What I am getting at, Mr. Brantley, if you know—if you don't know, say so—is who closed the building the night before Christmas?

A. I think it was Charlie Wilson. Now I am not sure; I couldn't say for sure. [71]

Q. You don't know who the last person in the building was?

A. I could have gone in there myself.

Q. When was the last time on the 23rd—you say you could have gone in yourself—do you mean the downstairs? When was the last time on the 23rd when you were upstairs in the building?

A. The 23rd?

Q. Yes.

A. Just prior to my going off shift I imagine; I can't remember for sure.

(Testimony of Joseph Brantley.)

Q. What was your occasion for going up?

A. Well we have our washroom up there and we go wash up after we get off shift.

Mr. Crane: May I have your exhibit, Mr. Clerk, of the rooms.

(A paper is handed to Mr. Crane.)

Q. Mr. Brantley, did you on the afternoon of the 23rd go back into the room where the fire occurred, and if so at what time?

A. If I went in there the 23rd, which I don't remember whether I did or not, it would be early. It would be early for I would be going in for gas or some occasion like that.

Q. For what? A. For gas.

Q. Oh. There was gas kept in this back room?

A. There was a gas can in there.

Q. In other words, this room was the natural storage place for gas to your knowledge?

A. No, it wasn't the natural storage place. [72]

Q. Well if it wasn't the natural storage place, how did it come to be there on the 23rd? How do you know it was there, if you were present on the 23rd? How did you know?

A. Charlie Wilson told me.

Q. But you are not sure whether you went in there or not?

A. Not on the 23rd; I can't be sure of the date.

Q. That's the day before the fire.

Mr. Hermann: I object, if your Honor please. He is mis-stating the evidence completely.

The Court: The witness himself corrected you.

(Testimony of Joseph Brantley.)

You have been asking him about the 23rd, which would not be the day before the fire.

Mr. Crane: I mean the day before the fire.

The Court: In all these questions then, you had better begin again because you have been asking him about the 23rd.

Mr. Crane: I beg your pardon. I have been misstating myself.

Q. (By Mr. Crane): I mean the Christmas Eve, the day before the fire, what time did you go in the room upstairs where the fire occurred, if you went in there?

A. It would be early in the morning, if I went in there, because that's usually when all of our water pipes are frozen, when you first come on shift. That's when you need the gas to run the blow torch to thaw out the water line in the sink.

Q. All right. Then if you went in there on the morning of the 24th, you went in there for the purpose of getting some gas for the blow torch? Is that right? [73]

A. That's right.

Q. Then you knew what was in the room on the morning of the 24th?

A. Yes, I knew there was gasoline there.

Q. All right. Was it the same gasoline can you testified was still there after the fire?

A. Yes.

Q. Had it been disturbed any from the 24th? Had it been moved around?

A. The can had been moved.

Q. You don't know whether it was moved in the course of the fire by the fire fighters or not?

(Testimony of Joseph Brantley.)

A. I was the first one in to the scene of the fire. Unless someone else had a key and went in there and left after I did.

Q. Are you certain that you were the first one into the scene of the fire?

A. Unless someone else had a key and was in there and left after me.

Q. Do you know whether or not the lights were on? A. We also had two lights upstairs.

Q. Do you know as a matter of fact that the building was dark at seven o'clock at night?

A. No, I couldn't say.

Q. Did you look at it to see?

A. Not at seven o'clock.

Q. Didn't you state in your direct testimony that you were back in the building that evening—or did you? I don't want to misquote you. You didn't go back on the evening of the 24th? [74]

A. Not at seven o'clock.

Q. Did you go back at any time on the evening of the 24th? A. At five o'clock.

Q. Were the lights in the upstairs windows burning or not? A. I couldn't say for sure.

Q. As a matter of fact, isn't it a common practice there for you to leave lights on in the kitchen which are burning continuously, day and night?

A. Not in the upstairs. It's true we left the kitchen light on; and he required two lights on during the night in the upstairs, which he considered necessary, and we were to turn those off after coming to work.

(Testimony of Joseph Brantley.)

Q. After coming to work when?

A. In the morning, on the morning shift.

Q. Now let's once more get this straight. You were not upstairs in the Kotzebue Grill either in the afternoon or evening of the 24th?

A. Yes, I was.

Q. You were up there? A. I was.

Q. If so, at what time.

A. I was up there at approximately one o'clock and at four o'clock.

Q. At four o'clock? A. Yes.

Q. I don't mean Christmas Day; I mean the 24th, the day before Christmas.

A. On the 24th? I am sure I went up there then. I don't know about the back room, but I was upstairs. There is hardly a day goes by I didn't go upstairs. [75]

Q. All right. When you were upstairs the last time back in the room where the fire occurred, tell me, was the transom open into the attic?

A. The last time before the fire?

Q. The last time you observed it.

A. It was not.

Q. When did you first observe it open?

A. The night of the fire when I went into the building.

Q. All right. Now coming to Christmas, the day of the fire, let me ask you this: Were any stoves going upstairs? A. Yes.

Q. How many? A. One.

Q. Where was that?

(Testimony of Joseph Brantley.)

A. In Mr. Salinas' room. That was a small oil stove.

Q. That was the only stove burning upstairs?

A. That's true.

Q. Christmas day you went through there at what time first? A. Around one o'clock.

Q. What was your purpose in going up?

A. To fuel the stove in his room.

Q. What reason did you have to go in the back room, or did you go in the back room?

A. I did.

Q. For what purpose?

A. Just the usual thing; checking the building as I usually do. [76]

Q. And at four o'clock? A. Yes.

Q. You went in? A. Yes.

Q. You made a routine check? A. Yes.

Q. What was the condition of the building at that time?

A. It was normal, the way I stated previously. Everything was in order; there wasn't anything disturbed at four o'clock.

Q. Now what was the next time Christmas day you went in there?

A. About an hour later. It must have been around five o'clock to the best of my knowledge. I only went into the downstairs area.

Q. All right. At the time that you went up there at four o'clock, was the place normal, the gasoline can still sitting in the corner, everything of that kind? A. Yes.

(Testimony of Joseph Brantley.)

Q. This so-called booby trap wasn't set up, was it, at four o'clock in the afternoon, with the steps and chair? A. No.

Q. Now I am going to ask you to explain the night of the fire. First I am going to ask you—you say you were at home when they notified you of the fire? A. Yes.

Q. You went immediately to the building?

A. Yes. [77]

Q. Got the key from the downstairs?

A. Yes.

Q. Did you go back in the kitchen at that time?

A. You mean when I went to the fire? When I went in?

Q. Yes.

A. I had to go into the kitchen to get the key to the upstairs.

Q. You went clear in the kitchen? A. Yes.

Q. Did you see Thomas Goodwin and Gene Starkweather in the kitchen at that time putting soda in the range to put the fire out, before you went upstairs?

A. Gene Starkweather broke in through the back window after I had obtained the key for the upstairs, and he put soda in there. I didn't see him do it but I know it extinguished the fire in the cookstove.

Q. I assume from that then, it isn't true that Gene Starkweather and Tommy Goodwin was putting out the fire in the stove and cutting the oil lines off at the time you came in to pick up the key to go upstairs? A. No.

(Testimony of Joseph Brantley.)

Q. That's not true. Now when you got up to the fire what was the first thing you do? The first time you did, I should say.

A. Well, I proceeded to extinguish the fire. First I had a couple of boys with me and I told them to find any kind of containers, buckets or anything that would hold water. We needed water bad.

Q. What did you do with the water?

A. We threw it right on the fire. [78] The hottest part of the fire.

Q. What part was that?

A. The center of it.

Q. Up in the attic? A. Yes.

Q. Did you go up in the attic yourself?

A. Not at that time. After the fire was partially extinguished I tried to get up into the attic through a different door, trap door.

Q. Isn't it a fact that you were more or less excited that night? A. Yes, I was.

Q. Isn't it a fact that while you were downstairs, or under the trap door, that Tommy Goodwin and Gene Starkweather came up and, to use the exact expression, said to you "Why in the hell don't you get up where it's at?" and picked you up and boosted you up there?

A. No, not through them saying that. Maybe they came up too; after the fire was extinguished down I went in through another trap door, through another attic entrance. Who lifted me there I couldn't tell you.

Q. Mr. Brantley, now describe to me again just

(Testimony of Joseph Brantley.)

what all was on the floor under the trap door? You said there was a chair, cases of fruit, and what else?

A. There was a chair right underneath the trap door; there was two cases of Sunny Boy jam sitting in the chair; there was one case sitting beside the chair on the floor, which made a sort of stepladder.

Q. In other words, so you could step on one case and then step up on the other cases. Is that it?

A. Yes. Then you could pull yourself into the attic.

Q. All right. From the top of this so-called stepladder, you could [79] have access to the attic?

A. You could pull yourself into it very easily from the top.

Q. All right. That's what I want to get at. From the top of the stepladder could you reach in the attic and work or would you have to pull yourself up in the attic.

A. I would say it would be principally due to the height of the man.

Q. Say he was an average man. Could you, yourself, stand on the stepladder and use a soldering iron, and happer, a pair of pliers or other equipment to work with, or would you have to go in?

A. No, I could not, and see what I was doing. I would have to be a little taller.

Q. Not and see what you were doing? Now you testified that when you were with the investigating officers, you picked up pieces of wastebaskets and

(Testimony of Joseph Brantley.)

parts of ice cream containers and hoops and so forth. Did I understand you to say you picked those up in the attic?

A. I didn't pick them up. I only saw them brought out of the attic.

Q. They were brought out of the attic?

A. That's right.

Q. Now, I want to get this right. Besides the stepladder that goes into the attic, somebody had packed up the stepladder and into the attic, waste baskets, ice cream cartons, and what else had they stored away in the attic? A. Soldering iron.

Q. Was the soldering iron connected to anything?

A. The fire had done such damage actually I couldn't be sure. I know it was in the attic. [80]

Q. Whose soldering iron was it?

A. That I don't know.

Q. Does anybody know?

A. Not that I know of.

Q. The soldering iron that belongs in the Kotzebue Grill and that has always belonged there, in the Kotzebue Grill, was there at the time of the fire and is still there, isn't that correct?

A. Yes.

Q. How long, approximately, in your judgment, would you believe it would take to pack all this paraphernalia and stash it away in the attic?

A. To my judgment, the way things were arranged, I believe it could be accomplished in a matter of thirty minutes. Maybe twenty-five or thirty.

(Testimony of Joseph Brantley.)

Q. Now when you discovered the fire, all of this stuff was still left intact so somebody could find it, wasn't it? The chair, cases of fruit and waste baskets upstairs, everything was left right out there in plain sight under where the fire was?

A. That's right.

Q. Nothing had been concealed? A. No.

Q. You testified on direct examination that at the time of the fire, the lights had been blown out by a short, by a short circuit. Where did that short circuit occur?

A. In the attic where the fire was. I am not an electrician and I did not run it down to see where the short was. There was so much—the extent of the damage in there. [81]

Q. All right. How did you know the short circuit occurred in the attic?

A. I said I wasn't sure where it occurred.

Q. What was the type of electricity in that attic?

A. It was old type wiring, very old wiring throughout the whole building.

Q. In fact it was known as knob and tube and BX. You are the maintenance man of that building, now isn't it a fact that BX has been condemned in that type of building? A. Yes.

Q. Do you know that BX laying along sawdust or along floors is the most hazardous piece of wiring there is?

Mr. Hermann: I object to Counsel's statement and——

(Testimony of Joseph Brantley.)

Mr. Crane: He says he is the maintenance man.

The Court: Yes. But not an electrician, and I doubt if your question is proper cross examination.

Mr. Crane: Very well, your Honor.

Q. (By Mr. Crane): What was your duty as maintenance man?

A. When I say maintenance man, when he hired me they needed a man there because they had trouble with the water pump, and we had trouble with the oil line freezing up, and, you know, stuff like that. It was up to me to get them operating properly, and functioning again.

Q. All right, he had trouble with the oil lines and fuel pump. Didn't he also have trouble with electrical equipment?

A. Not to my knowledge. There was no direct trouble; it was just that it was poorly wired, which anyone could see. [82]

Q. You say it was poorly wired. Was it hazardous?

A. Well that would be up to REA to decide.

Q. All right. Didn't you know of your own knowledge that it was condemned by REA?

A. Yes. They closed it down.

Q. Then you know the wiring was faulty all over the building? A. Yes.

Q. Now let's come back to another subject for a minute, Mr. Brantley, about these keys. You testified on direct examination there were three sets of keys. All right. Let's account for the three sets of keys.

(Testimony of Joseph Brantley.)

A. Mr. Salinas carried a set; I carried a set; and there was a set locked in the building.

Q. Three sets of keys to all the locks in the building? A. That's right.

Q. Where is your set?

A. Mr. Salinas has them.

Q. Isn't it a matter of fact that a set of keys to that building was found in another man's residence a week after the fire? A. That's right.

Q. How do you account for them being there?

A. They are the keys, I guess, to enter the building which I lost.

Q. Explain, please.

A. The keys to enter the building which I lost; not the set of keys I carried.

Q. Is it those keys which were found on Gene Starkweather's bed in [83] Kotzebue, Alaska,—were they not handed to you and you tossed them back and said you didn't know what they were?

A. They were not.

Q. And then didn't you say later "give me those keys. I believe they are mine"?

A. Mr. Starkweather showed me one key, concealing the other two. We was talking about a key, and he asked me, "Is this the key?" And I said, "No, it isn't." It wasn't shaped like the round key of the type we were talking about. I sat there talking to them all a few minutes and he was twisting them around on his finger, and that's why I identified them, when I saw them on his finger.

Q. You were looking for keys that night, were you not?

(Testimony of Joseph Brantley.)

A. Not those keys; the keys I thought were lost.

Q. You were looking though for keys to get in the building?

A. I had keys to the building in my pocket.

Q. Yes. And Mr. Starkweather had another set of keys to the building? A. That's right.

Q. And that's two sets of keys?

A. That's right.

Q. What did the other square key fit?

A. The juke box.

Q. Did you use the juke box key that night?

A. No.

Q. Are you sure of that?

A. I am sure of it. [84]

Q. As a matter of fact, in your conversation there with Mr. Starkweather you said the reason you were looking for the keys was because you wanted to get the key to the juke box so you could get in and get the money out of the juke box? Is that correct? A. Yes, that's right.

Q. All right. You didn't, but you wanted to, is that right? A. Yes, I wanted to.

Q. You didn't have the key to the juke box on your own set of keys?

A. Not the key to the juke box, no.

Q. What became of the key to the juke box?

A. I don't know what became of it.

Q. What became of the money out of the juke box?

A. I don't know; I never obtained the key to get into it.

(Testimony of Joseph Brantley.)

Q. Didn't Mr. Starkweather find a key that night that would fit the juke box? A. No.

Q. You are certain of that. A. Certain.

Q. You are absolutely certain that the key of the juke box wasn't on that set of keys found on Gene Starkweather's bed?

A. Absolutely.

Q. All right. Didn't you just testify that a square key was the key to the juke box?

A. No.

Q. All right. What did you say? [85]

A. I said the key that fit the juke box was round and the key that he had was square, a square-shaped key, and wouldn't work.

Q. Who had it? Where did you eventually find the key to the juke box? A. I never did.

Q. Now coming to this upstairs, back to the upstairs room again, you talked this morning about going in and out of the attic. I will ask you if it isn't a fact—first, I will ask you this: You have examined this attic and have been up there?

A. I was in the attic, yes.

Q. Did you make any examination of it, either before or after the fire?

A. No, not an examination. The only thing I went in for was just to see the extent of damage that the fire did.

Q. How large did you say that room was?

A. Twenty to twenty-five feet maybe, square.

Q. Isn't it a fact it's a little smaller than that really? A. Yes, it could be.

(Testimony of Joseph Brantley.)

Q. All right. I will ask you this: If between the back room, which you call a storeroom, and the front end of the building, if throughout the attic and ceiling, if the whole business isn't bulkheaded off and that separates those off solid? Do you know what I mean by "bulkheaded"?

A. Yes, I know what you mean.

Q. Isn't that room bulkheaded off?

A. I know there are some 2x6's in there but I think you can get around them.

Q. You think. Do you know? [86]

A. I am not positive.

Q. You wouldn't say it was not bulkheaded off?

A. I would say it wasn't sealed off.

Q. As a matter of fact, you say it wasn't sealed off? A. Yes.

Q. When you first went in there, was there smoke or fire? A. Yes.

Q. No, I said smoke or fire?

A. There was both.

Q. Was it principally smoke, or was it principally fire?

A. Well, I had already threw a considerable amount of water on it, which caused a greater amount of smoke but there was still fire going, it was still burning.

Q. When you first went in there was the fire confined to the roof?

A. It seemed to be in between, rolling in between. She was suffering from lack of draft.

Q. The reason it was suffering from lack of

(Testimony of Joseph Brantley.)

draft, was it not on account of being bulkheaded off?

A. No, I don't think that would affect it; if the other attic trap door had been removed, then it could have created a draft which would have been impossible to put the fire out.

Q. All right. The other trap door wasn't removed? A. No, it wasn't.

Q. And if the other trap door had been removed it would have created a draft and the draft would have created additional fire? [87]

A. Or if I had been five minutes later it could have burned the building.

Q. All right. Now describing the building as this: It's a long building—we will take these two positions here (indicating). The back end, we will say, is the storeroom; the center here consists of two bedrooms, the toilet and so forth; this is the front room used for utility room and office. Now if I understand you correctly—we will say that this is the front of the building on Kotzebue Sound—we are looking toward the rear of the building (indicating). Now I want you to point out to the jury and explain just what part of the building that fire was set.

A. I didn't get your plan too good on the building.

Q. All right. We will put it this way. We are both familiar with the building. Now we will take it this way: we will call these two here (indicating), the sides of the building, between these two

(Testimony of Joseph Brantley.)

posts. Up where you and his Honor are sitting is the front room used for the office and the general room, the large room. That is Kotzebue Sound, the street out there. A. Yes.

Q. All right. We come back here about in this portion and we have a hallway coming through here (indicating). We have Mr. Salinas' bedroom and over here is the bedroom of Charlie Norton and on this side the toilet and storeroom (indicating). Is that correct so far?

A. That's right.

Q. All right. Then we come on back, say about this area, and then we have the rear room of the building, do we not? A. That's right.

Q. Then, if I am correct in your testimony, we have the trap door—the trap door would be [88] about in this position here, would it not (indicating)?

A. If you were standing in the center of the room it would be about here (indicating).

Q. Is the trap door in the center of the room or a corner of the room?

A. The center of the room.

Q. Are you sure of that? A. Yes.

Q. Isn't it a fact that the trap door is in that corner of the room?

A. No. It's in the center of the room.

Q. All right. We will put it in the center. The trap door is in the center of the room here?

A. That is correct.

Q. Then with all of this building, all of the

(Testimony of Joseph Brantley.)

front of the building, all of the downstairs of the building, the platform that was built up for the purpose of setting the fire was put in the far end of the last room of the building, upstairs directly under where I am pointing? Is that correct?

A. Will you repeat that again.

Mr. Hermann: Objected to, if your Honor please, as a double question.

The Court: It is proper cross examination.

Mr. Taylor: He has already stated that the trap door was in the building, in the room.

The Court: Just a moment now.

Mr. Crane: The photograph will show it.

The Court: You should base that type of question on the testimony [89] rather than change it. Objection sustained because it is not based on the witness' precise testimony.

Mr. Crane: Very well. I will have to ask the witness a couple of more questions.

Q. (By Mr. Crane): Mr. Brantley, this rear room back here, did that extend the width of the building? A. Yes, it did.

Q. Then the two bedrooms are here—correct me if I am wrong. Now as you walk down the bedroom, Mr. Salinas' bedroom is on the right going this way (indicating). The bedroom, as we call it for the purpose of this question, Charlie Norton's room would be on my left. When I walk through this place here (indicating), I am coming into the rear room, am I not?

A. That's right.

(Testimony of Joseph Brantley.)

Q. All right. That room extends from wall to wall does it not? A. Yes, it does.

Q. Now correct me if I am wrong when I say, according to your testimony then, the trap door would be about here, would it not (indicating)?

A. A little more to the left of the doorway.

Q. This way? A. The other way.

Q. The trap door would be about in this position (indicating)?

A. About the center of the room.

Q. About the center of the room. All right. Now as I understand your testimony, in the center of this rear room there was a platform built—now [90] let me precede that question. Do you know what was stored in the front room?

A. Yes. I know most of the items that were there.

Q. Was it the staple groceries and stuff of that kind? A. Yes.

Q. Now I believe you stated that in this back room beside the chair there was a case of jam on it, and a case of jam that was used as a stepladder to get up on it. Was it usual to store jam and commodities in the rear room, or had they been stored in the front room?

A. No, they were normally there.

Q. Normally in the back room? A. Yes.

Q. Which part of the back room? Would it be the storage for staple groceries?

A. Well, the staple groceries would have been in the front room and this stuff was stored in the

(Testimony of Joseph Brantley.)

back; dried beans and toilet tissue, and he had this jam sitting along the north side of the building up against the wall.

Q. Now in order to build up this platform the jam would have to be moved from the north side of the building out to the center of the building to build up this so-called step ladder? A. Yes.

Q. It would have to be carried to the chair?

A. Yes.

Q. Now where was the chair in that room, or did the chair come from another room?

A. The chair was in the room. [91]

Q. That chair was placed directly under the so-called vent in the attic, wasn't it? A. Yes.

Q. Now what else was down there beside the chair and the two cases of jam?

A. A five-gallon can, partially—mostly empty, of blazo fuel.

Q. You say mostly empty?

A. A gallon in it or two. About a gallon in it—is close enough. Maybe a little less.

Q. And that was where?

A. That was sitting about maybe a foot away from the chair, maybe six or seven inches.

Q. And at the time you went up the stairs to the fire that five gallon can of gasoline was still sitting in the middle of the floor for somebody to find, wasn't it? A. It was there.

Q. There was no comment about it?

A. No, there wasn't.

Q. Now——

(Testimony of Joseph Brantley.)

Mr. Crane: Did your Honor wish to take a recess at this time?

The Court: We did not get started until 2:15, so I had in mind that we could run until 3:15 and take a little longer recess, if that is agreeable.

Mr. Crane: I am starting another subject, is the reason I inquired. [92]

Q. (By Mr. Crane): Now Mr. Brantley, you were questioned by the District Attorney about the business conditions of the restaurant, about the supplies, the amount of business and so forth, carried on in the restaurant. Did I understand your testimony correctly to say that business had fallen off during that time of year?

A. Yes, business was slow.

Q. Is there anything—have you worked in restaurants before? A. Not commercially.

Q. You say you have lived in Kotzebue two years, and you are acquainted with the town business conditions and the people of the town more or less, are you? A. Considerably.

Q. Isn't it a matter of fact that along in the middle of winter business conditions are always slow in Kotzebue?

A. Well, depending—last winter there wasn't too much slack business there because of the Western and Federal Electric men that were in town for the Site.

Q. But in December of 1957, were there any construction crews or anybody like that boarding or eating at the restaurant?

(Testimony of Joseph Brantley.)

A. Well there was **** Construction Company. We were feeding his men, and there was three or four from that to six that were eating in there, and they left before this thing occurred.

Q. They left before? A. Yes.

Q. Then at the—correct me if I am wrong—you said that just before [93] Christmas time business had slacked off? A. Yes, it had.

Q. Now what was your reason for saying that? Was there anything unusual about business slackening off at that time of year?

A. Well I can tell by my meals that have been put out, whether they are served or not.

Q. Well, what I say is, that didn't business slack off all over town? A. Well, I don't know.

Q. You were merely running a restaurant? If you know—what I am getting at is, is there anything unusual about a lack of business at that time of year?

A. Well in my own opinion I don't think there is anything unusual about it, although for the past two years, from the way I understand, there had been a booming business in Kotzebue.

Q. I am not interested in what you understood before you left, Mr. Brantley. Wasn't it your testimony that the stock was getting low and they were letting the stock run down? Isn't that a normal thing to do when business gets slack—to let the stock get low and replace it in the spring when the boat comes in? Is there anything unusual about that?

(Testimony of Joseph Brantley.)

A. Yes, it is very unusual, especially for Mr. Salinas, due to the fact that he liked to keep the place well stocked. He always had it well stocked ever since I can remember. Why I can remember even all during the winter months he always had supplies coming in.

Q. How much supplies did he have in there at that time approximately? In dollars?

A. I wouldn't know how to estimate it? [94]

Q. I will ask you, isn't there still a thousand pounds of meat still in the freezer?

A. Yes, there is meat that has been there quite awhile.

Q. I say, isn't there approximately a thousand pounds? A. I would say about that.

Q. All right. How long would a thousand pounds of meat run a restaurant there, in your opinion, at that time? That particular restaurant, the Kotzebue Grill. How long would it take them to eat up a thousand pounds?

A. It would take quite awhile.

Q. All right. Is that a shortage of supplies?

A. You couldn't count just supplies. You got to take into consideration fresh vegetables.

Q. I am not talking about that. Taking one thing at a time. Now a thousand pounds of meat, how long would it take them to eat up a thousand pounds of meat?

A. It would take a long time.

Q. A long time. All right. You talked about stuff

(Testimony of Joseph Brantley.)

being stored upstairs. How many sacks of dried beans were upstairs?

A. Two 100 lb. sacks.

Q. Two 100 lb. sacks. How often do you serve beans in the restaurant?

A. We never did serve any dried beans that were there. These were sacks that had never been opened.

Q. You still had 200 lbs. to feed people if they wanted something to eat?

A. Well, if they wanted to order beans I guess we could serve them.

Q. How long would it take in a restaurant of that type to use up 200 lbs. of beans? [95]

A. I don't know. It would take a long time.

Q. All right. We've got a thousand pounds of meat in Mr. Salinas' restaurant, and 200 lbs. of beans. How many cases of jam have we got stacked against the wall in the back room?

A. The minimum would be twelve cases.

Q. Twelve cases of jam. Those are big gallon-size cans, are they not? A. Yes.

Q. Twelve cans, I believe, to a case—or are there six?

A. There are six, I think. I think there are six cans to a case.

Q. All right. That would be how many cans of jam?

A. How many cans of jam—that would be about seventy, approximately.

Q. About seventy cans of jam. How long would it take to use that up? A. About a year.

(Testimony of Joseph Brantley.)

Q. All right. Now how many cases of corn was there out in the front room?

A. I really don't know.

Q. Approximately?

A. The way the stuff was mixed up there—there could have been eight cases of corn, six No. 10 cans.

Q. Six No. 10 cans of corn. A No. 10 can of corn will run you what, one day or two days?

A. We was having a lot of spoilage on corn, and being such large cans and our business had slacked off, and when you opened a can you would have a lot of waste.

Q. All right. Then you wasn't using corn?

A. Not too much. [96]

Q. All right. How many cans of vegetables did you have?

A. Beets and string beans and green peas and stuff like that. Just the amounts I couldn't tell you, but we had ample supply of canned goods.

Q. An ample supply of canned goods. Then there was no shortage of canned goods and no shortage of meat?

A. Only in your hamburger line.

Q. Only in hamburger. You could grind hamburger if you wanted?

A. Do you want us to grind our T-bone steaks up?

Q. You had T-bone steaks on hand?

A. Yes.

Q. How many T-bone steaks did you have approximately?

(Testimony of Joseph Brantley.)

A. Well, there was a lot of them, quite a few.

Q. In other words, you had enough to run a restaurant for about three or four months without ordering anything?

A. No—not in operating a restaurant like we operated there. We served our soups and salads and deserts. You had to have vegetables.

Q. All right. Let's get down to the soups. What did you make your soups out of?

A. It depended on what type of soup.

Q. Well, did you have any macaroni there?

A. Yes. And we had rice, spaghetti, noodles; we had split peas and, well, any kind of stuff like that.

Q. Now, you are a cook. Doesn't that all make pretty good soup?

A. Sure it makes good soup.

Q. All right. How much butter did you have in the joint? [97]

A. We had an ample supply of butter; just exactly how much I don't remember.

Q. Well, you had plenty of butter to run on?

A. Yes.

Q. How about eggs?

A. We had a bunch of eggs but they were going bad on us.

Q. Is that when you sold a couple of cases to Ferguson, that you got rid of after Steve left for Outside?

A. Well, he would have got rid of them if he had been there.

Q. All right. Now we have got down to that.

(Testimony of Joseph Brantley.)

How much did you have in the line—did you have all the condiments necessary, like salt, pepper, spices?

A. Yes, we had that. But tomato catsup, chili sauce—we were short on tomato catsup.

Q. One shortage.

The Court: Well, now, counsel, would be a good time for a recess. We have been in session about an hour. Perhaps the jury would appreciate fifteen minutes recess. If you will try and be prompt—because I know some of you would like to get a cup of coffee.

(Thereupon the Court duly admonished the jury and a fifteen minute recess was taken.)

After Recess

(At approximately 3:30 p.m. court reconvened and the trial of the cause was resumed. The witness on the stand at time of recess resumed the stand for further cross examination. Both counsel stipulated that all jurors were present.) [98]

Q. (By Mr. Crane): Now, Mr. Brantley, coming back to a few more questions regarding the supplies in the building, approximately how much flour did you have?

A. We got our flour from Rotman's as we needed it.

Q. How about sugar?

A. Sugar was the same way.

Q. Ordered from Rotman's as needed?

(Testimony of Joseph Brantley.)

A. Yes.

Q. How about milk?

A. Milk came the same way.

Q. Do you know, when you ordered that from Rotman's, whether you ordered that from Rotman's or you ordered it from restaurant supplies that were at Rotman's store?

A. We ordered it; we just took the order down there and they would fill it and we would pay for them out of the till.

Q. Did you know there were between eight and ten thousand pounds of staple commodities belonging to the Kotzebue Grill stored at Rotman's?

A. I did not.

Q. Now Mr. Brantley, coming back to this depleting of the stock—you are familiar with the restaurant business I believe you stated—isn't it usual to let stock be depleted at the end of the year for yearly inventory?

A. Yes, stock that is not perishable, that will keep.

Q. In other words then, the only thing was lacking to keep this restaurant in operation for months to come was a few perishables? Isn't that correct?

A. Perishables and hamburger meat. [99]

Q. Perishables and hamburger. Couldn't you get hamburger at Rotman's at any time?

A. You had to put in an order in advance. Several times we had put in orders.

Q. The only thing, in your testimony, that was holding up operations, was the shipment of hamburger that hadn't come?

(Testimony of Joseph Brantley.)

A. Hamburger and fresh vegetables.

Q. And you absolutely had to have that before you could operate the restaurant?

A. The way Mr. Salinas required, that's the only way we could operate.

Q. You don't know whether the type of weather, time of year, shipping conditions and weather, conditions of that kind may have held them back?

A. The orders weren't sent in by the usual channels.

Q. You went up and examined the records?

A. No. ACS brought the records down for us to examine.

Q. At whose request?

A. Esther Ipalook and myself.

Q. Who is Esther Ipalook?

A. She is the lady who works there.

Q. Is she the manager or are you the manager?

A. Well neither one of us were given full authority until right at the last moment. Mr. Salinas turned it over to me right at the last.

Q. Somebody was running the place, weren't they? A. Mr. Salinas was in every day.

Mr. Crane: I would like to have this marked for identification, plaintiff's Exhibit No. 1. [100]

The Court: Do you mean defendant's Exhibit?

Mr. Crane: Pardon me; I mean defendant's Exhibit.

Mr. Hermann: I wonder if I might see it counsel.

(A photograph is given to Mr. Hermann and then returned to the Clerk.)

(Testimony of Joseph Brantley.)

(A photograph is marked as defendant's Exhibit 1 for identification.)

Q. (By Mr. Crane): I hand you defendant's Exhibit No. 1 and ask you to say whether or not this portrays the scene of the back room where the fire occurred? A. Yes. That looks like it.

Q. Calling your attention to this photograph, I will ask you to examine carefully the upper structure that is shown, where the 2 x 4s run to the peak of the roof, and tell me whether you can notice the crown of the roof?

The Court: Counsel, hadn't you better offer it in evidence first.

Mr. Crane: Very well. At this time I will offer it in evidence. I may say at this time it's the same photograph that Mr. Hermann has.

Mr. Hermann: We have no objection to its being offered; it's the same thing.

(Defendant's Exhibit 1 is received into evidence.)

Q. (By Mr. Crane): I hand you defendant's Exhibit No. 1 and ask you to examine that [101] carefully, examine that photograph and see if it shows the roof of the building?

The Court: The roof of the building?

Mr. Crane: The inside of the roof of the building; perhaps I should have used the word ceiling.

The Court: You meant ceiling?

Q. (By Mr. Crane): I meant what I want you to show, Mr. Brantley, is when you look through the trap door from the ceiling, looking up where

(Testimony of Joseph Brantley.)

the 2 x 4s come together, I want you to point out where the crown of the roof meets.

A. Oh, I see. It would meet just a little to the left of this picture. The picture was taken at an angle like that (indicating), giving a different view and effect of the actual scene than if you were standing underneath. If you were standing underneath you could see the crown directly.

Q. Then I take it from your testimony that is not a true picture of the inside of the room.

A. Well, it's a true picture, but it could be deceiving.

Q. In what way is it deceiving?

A. From the angle of the picture, it is shaped so you would think that the picture is not taken directly under the trap door.

Q. You would think it was not taken directly under the trap door?

A. I would say not; that it wasn't.

Q. If it had been taken under the trap door, would it have shown the joists?

A. Well, you may have to look a little to the left in there.

Q. As a matter of fact, from that picture it shows that the trap door is not in the center of the room, does it not? [102]

A. I will say it is closer to the center of the room than it is to either wall.

Q. That's better. Now coming back—to illustrate—you have been in that room lots of times. When you walk in you walk in this way to the

(Testimony of Joseph Brantley.)

room (indicating), and you have a couple of beds on this side and canned goods on this side (indicating), and you walk on ahead, and isn't it a fact that that vent or hole in the room is over here (indicating), and not in the center of the room?

A. Well, as I stated to you before, I don't know if it was in the exact center of the room or not.

Q. Isn't it closer to the end wall and the side wall than it is to the center of the room?

A. I don't think so; I wouldn't say so.

Q. Now, do you know whether it is in the center of the room or it is not?

A. I would say it is closer to the center than to either wall.

Q. Closer to the center than to either wall?

A. Yes.

Q. While I think of it, some pictures by Floyd Land were introduced in evidence. Floyd Land took those pictures at whose request?

A. I didn't ask him who; I happened to be a witness to him taking the pictures. It was a nice day and he was having trouble with the camera due to the fact that it was so cold, and he was shaking, but he finally took enough that they came out all right.

Q. What business did Floyd Land have down there taking pictures, if you know? [103]

A. Well, I don't know.

Q. Don't you know that Floyd Land is an enemy of the defendant in this case, and made the statement in Kotzebue that he was out to get him?

(Testimony of Joseph Brantley.)

A. He definitely is not an enemy.

Q. How do you know that he is not.

A. Because when he was released by Mr. Salinas, he was brought back in there on his own free will at his own request to do odd jobs, and if he had been an enemy of Mr. Salinas due to his dismissal there he wouldn't have come in and worked for him later.

Q. Don't you know of your own knowledge that if a person, anybody in Kotzebue would color a photograph of that place, it would be Land?

Mr. Hermann: Object to the form of the question, if your Honor please.

The Court: It is argumentative. Objection sustained.

Mr. Crane: Very well, your Honor.

Q. (By Mr. Crane): Now coming back to another thing, Mr. Brantley, you say to get up into this attic, you could pull yourself up and climb up in the attic from the so-called stepladder that was built and left there?

A. Yes, it could be done.

Q. What was the condition of the attic?

A. It was pretty well burned.

Q. No. I mean prior to the fire. I beg your pardon.

A. Prior to the fire I wasn't in the attic, so I couldn't tell you.

Q. How long a pull would it be for a man—to approximate—we will [104] take a chair the height of one of these ordinary chairs, and on top of it a

(Testimony of Joseph Brantley.)

case of No. 6 cans, and a man stood on the case of No. 6 cans and chinned himself and pulled himself up in the attic, would he in doing that naturally disarrange his clothing and get into a certain amount of dust and dirt?

A. That I wouldn't know because I didn't see the attic before the fire. After the fire you couldn't help it because of the charred and burned debris laying around.

Q. A very old place isn't it?

A. Yes. Just how old I don't know.

Q. And there is sawdust insulation laying up there on top, inside of the trap door, and a man getting up there would naturally get sawdust and so forth on his clothing?

A. Depending on how careful he was.

Q. Loose sawdust. How far away from the opening were the containers? The ice cream containers?

A. I couldn't answer that because I didn't see the material until it was brought out of the attic, but from where the marshal was standing inside of the attic I could see his shoulder and side.

Q. What did the marshal use to go up in the attic? The same paraphernalia that was there?

A. No. He used the same arrangement less one case.

Q. What? A. Less one case.

Q. Less one case? A. Yes. [105]

Q. Then he reached in there and pulled out a waste basket, the remains of a waste basket?

A. Just the bottom part of it.

(Testimony of Joseph Brantley.)

Q. Now according to your direct testimony, the last time you saw that waste basket was where?

A. Well, the last time I saw it Mr. Adirim had it.

Q. Prior to the fire I should say.

A. Well now I couldn't tell you, because the waste basket was made of cardboard which burned, all except the bottom, and I couldn't swear on the waste basket at all.

Q. All right, then you don't know whether there was a waste basket in the attic or not. You testified on direct examination that they found the bottom of a waste basket in the attic. Now I am asking you how do you know it was the bottom of a waste basket? Or do you know? Could it have been a pie tin?

A. No. This was egg-shaped, and no pie tin was shaped that way.

Q. What was egg-shaped?

A. The bottom of the basket.

Q. How do you know it was the bottom of a waste basket, or could it have been something else?

A. I never saw an object like that except a waste basket.

Q. All right. You had never been in the attic of that building, you say? A. No.

Q. Approximately how long has that building been built?

A. I couldn't say; I don't know when the building was built. [106]

Q. Do you know who previously owned it?

A. I think Archie Ferguson owned the building.

(Testimony of Joseph Brantley.)

Q. Archie Ferguson. And he owned it prior to Steve Salinas? A. That's correct.

Q. And you noticed the trap door going into the attic? A. Yes.

Q. Do you have any idea what was stored in the attic? A. Not previous to the fire, no.

Q. Do you know whether anything is stored up there?

A. No. There was no storage there from what I saw after the fire. There had been some water barrels in there but whether they were used to supply water downstairs, that I wouldn't know.

Q. Then you don't know of your own knowledge whether the remainder of the so-called waste basket had been up there one day, one month or one year, do you? A. No, I didn't.

Q. All right. Now we will come to the ice cream containers. They have been selling ice cream in the restaurant for many years haven't they?

A. Since I have been there they have been selling ice cream.

Q. Since you have been in Kotzebue or since you have been in the restaurant?

A. Yes, since I have been in Kotzebue.

Q. All right. Do you know of your own knowledge what was in those ice cream containers when they were put in the attic? Do you know? I am asking you? [107]

A. If there had been anything in those containers except liquid, it would have been exposed, unless it was paper or something like that.

(Testimony of Joseph Brantley.)

Q. Wouldn't rags burn? That's what I mean, something inflammable.

A. Metal bottoms, nuts something like that, would be exposed.

Q. If it had been clothing it would have burned, wouldn't it. A. I imagine it would.

Q. You have testified they found three hoops. Now how do you know those hoops came off of ice cream containers?

A. Because they are identical.

Q. All right. Are those same kind of hoops on any other kind of containers?

A. Not that I have ever seen.

Q. Is ice cream only put out in cardboard containers with that type of hoops on it?

A. The only type I ever saw.

Q. But you don't know yourself? There could have been other cardboard containers?

A. I couldn't be positive; there are too many different things made, but nothing I ever saw.

Q. All right. Was any ice cream stored upstairs?

A. Definitely not.

Q. All right. Where in the building was these ice cream containers?

A. The ice cream containers, or the containers with ice cream were in the freezer.

Q. All right. That's fine. Now to get those containers in the— [108] Is it your testimony that somebody would have to go down and take ice cream out of the ice cream freezer, up along the outside door; going outside, up the steps, and go on

(Testimony of Joseph Brantley.)

back to the back end of the building and put it up in the attic to get the container there?

A. Not if they had been put in the attic previously.

Q. All right. That's what I am asking you, or do you know? A. No, I am not sure.

Q. How much of your testimony are you sure of?

The Court: Counsel, you do not give the witness full opportunity to answer.

A. I know Mr. Salinas had asked us to save these containers for him and wash them out and put them in the freezer in the back there. And we saved three I think.

Q. That's ordinary procedure in a restaurant, isn't it? To save containers to ship stuff in?

A. I don't know. I think there was one container that was empty and slid under the bed of Charlie Norton's room.

Q. Do you know how it got there?

A. I have no idea.

Q. Do you know what purpose it was used for?

A. I have no idea.

Q. Was there any refuse in it?

A. Nothing. It was a clean container.

Q. That was in Charlie Norton's room?

A. Underneath the bed. [109]

Q. How long had it been underneath the bed?

A. I have no idea.

Q. All right. What else was up there in the attic that had been in other parts of the building?

(Testimony of Joseph Brantley.)

What else was brought down from the attic besides the hoops and the remains of the waste basket?

A. A soldering iron.

Q. What type of soldering iron?

A. Well, it was burned. I didn't see the head part of it; the part I saw was the cylinder that goes inside of the iron, the igniter.

Q. Wasn't it a complete iron?

A. Well I never saw the outside.

Q. What did you see?

A. I just told you; I saw the inside of the iron.

Q. How do you know it was the inside of an iron?

A. I never saw anything else with a set-up like that, and I know it was the inside.

Q. Hasn't it been a custom for years for Ferguson to have all kinds of tools, soldering irons and paraphernalia, everything else laying around his place? Haven't you found it scattered all over the restaurant there?

A. No. Charlie Norton, the way he had the tools and everything was arranged neatly.

Q. I am not talking about Charlie Norton; I am talking about Archie Ferguson.

A. I don't know about it.

Q. Are you trying to tell the jury that the soldering iron had been put up there this time, the time of the fire or had it been there for months or weeks? [110]

A. Due to the fact——

Q. Never mind "due to the fact," just answer my question, would you.

(Testimony of Joseph Brantley.)

A. Well I am not trying to tell them; I know what was brought out of the attic.

Q. All right. That's better now. As a matter of fact, Mr. Brantley, you haven't any personal knowledge of anything in the attic, have you? All you know is just that the marshals packed this stuff out and showed it to you, isn't that correct?

A. That's right.

Q. You have no personal knowledge of any of this? A. Not prior to the fire.

Mr. Crane: That's all.

Redirect Examination

Q. (By Mr. Hermann): Mr. Brantley, do you know whether or not there was a light switch in the room under the trap door to the burnt part of the attic?

A. No. There was not, to my knowledge.

Q. Was there any switch anywhere in the building that controlled that room?

A. Yes. There was a switch before you go into the room in the little pantry there.

Q. Could you describe how it was located in relation to the door of the room?

A. Yes. It was to the right of the door facing; and it was a regular flip switch, a wall switch, toggle type I think they call it.

Q. Do you know what fixtures, if any, there were in that room, electric fixtures? [111]

A. Only the light fixtures, and I think there were four of them.

(Testimony of Joseph Brantley.)

Q. Four? A. Four or five maybe.

Q. How far away were they from the trap door?

A. A couple of feet one of them was I guess; two or three feet to the best of my knowledge was the closest.

Q. Do you know whether or not it was that premises that were condemned by the Electric Association?

A. I talked to the REA manager at the station, and he came in and told me he was going to shut my power off. He said that he had filed a record notice that he gave Mr. Salinas to have the place rewired six months in advance, or a year; I am not sure which.

Q. When was it shut down, the place, as you say?

A. After the fire occurred. It was January 4 or 5, around there.

Q. Do you know whether or not any repairs had been made to the electric circuit after the fire?

A. Yes. Harold Little — We kept getting this short up there after the fire, and he went up there and cut the wire some way so we could have lights in the rest of the building. He cut out the short there.

Q. Were there any lights remaining in that portion of the building?

A. Yes. There were lights there.

Q. I mean the portion of the building where the fire was.

A. No. There were no remaining lights there.

(Testimony of Joseph Brantley.)

Q. Were there any after Mr. Little cut the circuit?
A. No, there weren't. [112]

Q. Do you know how far from the room it was that Mr. Little cut the circuit?

A. He cut the circuit just about over the door of Mr. Salinas' room.

Q. I see. Mr. Brantley, during the time that you were cooking there, what was the main item sold by the restaurant? The main item of food.

A. Well at this point business had dropped off to where we was selling a lot of sandwiches, and we had a few dinners.

Q. What kind of sandwiches did you sell?

A. Well, we sold a lot of ham sandwiches and hamburgers and cold beef sandwiches.

Q. Will you tell us just what those sandwiches were made out of?

A. Hamburgers, you have hamburger patties. You use lettuce, tomato and hamburger relish.

Q. How about the other sandwiches?

A. They were served about the same way.

Q. Did all these sandwiches have fresh vegetables in them?
A. Yes.

Q. Do you know about how high the ceiling in that back room is?

A. Eight or nine feet high. Eight or nine feet—I am not sure of the exact measurements.

Q. Did the Grill ever, at any time, receive any hamburger from the Rotman Store?

A. Not while I was there.

Q. Do you know of any repairs that building was in need of prior to the fire? [113]

(Testimony of Joseph Brantley.)

A. Yes. It was in need of several repairs.

Q. Had you ever discussed any of these repairs with Mr. Salinas? A. Yes.

Q. Which repairs?

A. Just before he left we discussed putting new plywood in his room and fixing that up, and he wanted me to paint the dining room part.

Q. What did he say in regard to putting plywood in his room?

A. Well I asked him—some of the plywood had bulged, you know—and I asked him if he wanted new plyboard in there, and he said to suit myself.

Q. When was it that conversation took place?

A. That was the day before he left.

Q. Had he ever said anything to you before the fire about making repairs to the building?

A. No, there was nothing said before the fire.

Mr. Hermann: No further questions.

Recross Examination

Q. (By Mr. Crane): Between the time that Kotzebue Electric served the notice to Mr. Salinas regarding the electric current and the date of the fire, was there any repair work done in the restaurant, electric repair work, I mean?

A. The only electric repair that was done, Harold Little did it, and I think it was a matter of just knocking out a short circuit in another area.

Q. I think you misunderstood my question. I mean after the notice, before the fire, not after the fire. Was there any electric repair work done in there, any new wiring or anything?

(Testimony of Joseph Brantley.)

A. Not while I was there, there wasn't any.

Q. Do you happen to know, of your own knowledge, speaking of these four lights in the back room, do you happen to know one was out and there was a short circuit in the back room?

A. Your back room lights were never used. We always used a flashlight, or what have you, because there was no bulbs in them, and the main wall switch that you use going in, when that is off position, then you have no hot wire in the back room.

Q. Do you know though, that there was a short circuit in the back room?

A. No, not until after the fire.

Q. You don't know whether there was one there before the fire or not? A. No, I don't know.

Q. If there had been one there would you have known it? A. No, I wouldn't.

Q. While you are on the witness stand I would like to have these marked for identification. Defendant's 2, 3, 4, 5 and 6 and 7 marked for identification.

Mr. Crane: They may be marked as a group, or whichever is more convenient.

Mr. Hermann: May I see those first, Mr. Crane.

(The photographs are shown to Mr. Hermann.)

(A group of photographs are marked for identification as defendant's Exhibits Nos. 2, 3, 4, 5, 6, 7.)

Q. (By Mr. Crane): I hand you defendant's Exhibit No. 2 for identification and ask you to examine that and tell me what it is. [115]

(Testimony of Joseph Brantley.)

A. It's part of the interior of the room where the fire occurred.

Q. I hand you defendant's Exhibit No. 3 for identification and ask you to tell me what that is.

A. That's a front and side view of the Kotzebue Grill.

Q. And defendant's Exhibit No. 4 for identification and I will ask you what that is.

A. That's looking at the main entrance, the front and downstairs part of the Kotzebue Grill.

Q. Defendant's Exhibit No. 5 for identification. Will you please tell me what that is?

A. That's looking from the front room in the hallway, going to the back room.

Q. Is that upstairs or downstairs?

A. Upstairs.

Q. That's upstairs? A. Yes.

Q. And defendant's Exhibit No. 6 for identification?

A. That's from the back side of the building, giving a back end effect in the north side of the building.

Q. And defendant's Exhibit No. 7?

A. That's the stairway going to the upstairs part of the Kotzebue Grill, and the platform.

Mr. Crane: At this time, your Honor, I offer in evidence defendant's Exhibits Nos. 2 to 7 inclusive. I have already introduced defendant's Exhibit No. 1. [116]

Mr. Hermann: No objection.

The Court: They may be received.

(Testimony of Joseph Brantley.)

(Defendant's Exhibits Nos. 2 to 7 incl. are received in evidence.)

The Court: Of course it is really not proper cross examination, but it doesn't matter.

Mr. Crane: Well, I should have identified them earlier. That's all I have.

The Court: Well, the witness may be excused unless you have something, Mr. Hermann.

Q. (By Mr. Hermann): Were any of those pictures, pictures of the interior of the rear room?

A. Only one.

Q. Could you point that out.

The Court: I think you mentioned that as No. 2.

Mr. Crane: Here is No. 1. I don't know whether that was shown to the jury or not. That was identified as a part of the rear room.

(There were no further questions and the witness was excused from the stand.)

WHITTIER WILLIAMS JR.

is then called as the next witness for the plaintiff, and after being duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Hermann): Would you please tell the Court and jury your full name.

A. Whittier Williams Jr. [117]

Q. How old are you? A. 21.

Q. Where do you live? A. Kotzebue.

Q. Were you living in Kotzebue during the month of December, 1957? A. Right.

Q. Do you know a building known as the Kot-

(Testimony of Whittier Williams Jr.)

zebue Grill at Kotzebue? A. Right.

Q. Do you recall whether or not you were at the Kotzebue Grill on the 25th of December, 1957?

A. In the place?

Q. Yes. A. No.

Q. Were you near the place?

A. I was near the place, that's right.

Q. About what time?

A. About near midnight.

Q. How did you happen to be there, Mr. Williams?

A. Well, I was at the pool hall, Pete Lee's——

Q. Pete Lee's pool hall. How far is that from the Kotzebue Grill? A. It ain't too far.

Q. Pardon me?

A. It ain't too far from Pete Lee's pool hall.

Q. Is it a block or more than a block?

A. I think it's a block, or even less than a block.

Q. What did you see when you got to the Kotzebue Grill. What was the first thing you saw?

A. You mean when they hollered fire or something?

Q. Where were you when they hollered fire?

A. I was at Pete Lee's pool hall.

Q. What did you do after that?

A. After—you mean while I was in there?

Q. After you heard them holler fire.

A. I went out.

Q. Did you go to the Grill at that time?

A. That's right.

Q. What was the first thing you saw when you got to the Grill?

(Testimony of Whittier Williams Jr.)

A. I seen some boys and the side door.

Q. What boys were those, do you recall?

A. No. There was too many. I didn't have time—
I was excited too.

Q. Do you recall whether or not you saw Joe Brantley? A. Yes.

Q. Where was Joe Brantley when you saw him?

A. I went in, at the side door; there was lots of boys, and I didn't make out all their faces but they were in there. He came in, Joe Brantley, to get the key; he looked for it and found it.

Q. Where did he find it?

A. Probably hanging on——

Q. Did you see him find it?

A. I know he get it. [119]

Q. What did you do after he got the key?

A. We went out from the place, and there is a side entrance——

Q. A side entrance? A. That's right.

Q. Was that an upstairs entrance or downstairs? A. Yes, upstairs.

Q. Did you go upstairs with him?

A. That's right.

Q. Do you know whether or not the upstairs door was locked? A. It was locked.

Q. Who opened it? A. Joe opened it.

Q. What happened after Joe opened the door?

A. We went in there.

Q. Where did you go inside?

A. Inside after we opened the door.

Q. Yes?

(Testimony of Whittier Williams Jr.)

A. We went through the door, and there is, I mean there is a hall or something.

Q. I see. A. We went to the back room.

Q. What did you see when you went in the back room?

A. We didn't have time to look around, just for the fire.

Q. I mean after you entered the back room, what did you see?

A. It was dark; there was no lights. [120]

Q. Do you recall whether the door to the rear room was open or closed?

A. It was open all right.

Q. Did you see anything at all in that room?

A. You mean going to the room back there where there was the fire in the back room? After we went into the little back room?

Q. Yes.

A. There was a chair and two cases of canned goods.

Q. And where was the chair in the room?

A. Right underneath the door of that attic.

Q. Was there anything else in the room besides the chair and the two cases?

A. A five-gallon Blazo can.

Q. Would you describe the Blazo can to us please. A. Tell you what it looked like?

Q. Yes. A. A regular five-gallon can.

Q. Did it have a cover? A. No.

Q. Where were these two cases of canned goods that you saw?

A. Right on top of the chair.

(Testimony of Whittier Williams Jr.)

Q. Were they one on top of the other?

A. That's right.

Q. What did you do after that?

A. We started trying to stop the fire.

Q. What did you, yourself do? [121]

A. I was holding a flashlight; we were trying to get a light.

Q. What was Mr. Brantley doing?

A. Trying to get some water, but the shower room there was no water. We tried that—no water; only hot water—steam—no water, so they got some fixe extinguishers. I wasn't with them when they got the fire extinguishers but they get them. And after they get the fire extinguishers they drilled a hole in the front of the building, through the ice I mean, and they started hauling water.

Q. How long did the fire last?

A. Well I don't know how long exactly it lasted.

Q. Was it more than an hour or less than an hour?

A. I would say a little more than an hour. That would be my guess anyway.

Q. Did you see Steve down there? Steve Salinas?

A. That's right.

Q. Did you see him there?

A. About after fifteen minutes; after we were hustling around he came in.

Q. What was he doing there?

A. Well, he came into the building and looked at the fire.

Q. Did he try to stop it in any way?

A. We try to stop it and he went in.

(Testimony of Whittier Williams Jr.)

Q. Did Mr. Salinas try to do anything to stop the fire?

A. Well he came in and looked at the fire. I believe he go on top of the chair and see how was the fire. I mean how far the fire went. I didn't [122] hear him say nothing though. I mean I was kind of far; I was holding a flashlight.

Q. About how long did he stay at the fire?

A. A pretty good period of time.

Q. About how long?

A. Let's see? I don't know — I don't know exactly how long he stayed.

Q. Did he do anything to fight the fire besides look at it?

A. It was too crowded anyway, people going in and out and everything, trying to stop it anyway. I don't know exactly what he was doing.

Q. How long did Mr. Brantley stay there?

A. Well he stayed as long as I did.

Q. Did Mr. Salinas stay as long as you did?

A. I don't believe so.

Q. Did you see Mr. Salinas throw water or do anything like that? A. No.

Q. How did Mr. Salinas look? Did he seem to be excited or anything?

Mr. Crane: I object to that, if your Honor please. Calling for a conclusion of the witness, how a man looked.

The Court: Objection overruled. He may answer.

Mr. Hermann: Could we have the question read, please.

(The reporter reads the previous question as

(Testimony of Whittier Williams Jr.)

follows: "How did Mr. Salinas look? Did he seem to be excited or anything?")

A. No. He seemed to be calm. [123]

Q. (By Mr. Hermann): Could you tell whether or not the cover to the ceiling entrance was there or not? To the ceiling entrance.

A. You mean the door to it?

Q. The ceiling entrance.

A. It was open when we came in.

Q. Could you see the cover to it at all?

A. No. I believe it was pushed upwards.

Q. Was there anything else in that area that you noticed? A. In the room?

Q. Did you see anything else near the trap door? A. There was a bed, a little cot.

Q. I mean in the ceiling area, near the hole to the attic. A. No—There was a cord.

Q. How long a cord?

A. I don't know how long. I didn't go up to the attic and see how long.

Q. How much was sticking out?

A. Six or eight inches.

Q. Do you recall what color it was?

A. Black.

Q. Now on the floor did you see anything besides the cases and chair? A. The five-gallon can.

Q. Where was the five-gallon can in relation to the chair? How far from the chair?

A. Not too far. It ain't far from the chair.

Q. Did the lights go on at all while they were up there? [124]

(Testimony of Whittier Williams Jr.)

A. They turned the switch on once, but I believe there was a short circuit in that little place there, in that little room, and they turned them off and we had to use a flashlight.

Q. Do you know how long they stayed on?

A. Just about ten minutes. Maybe a little less than ten minutes. I would say ten minutes.

Mr. Hermann: No further questions.

Cross Examination

Q. (By Mr. Crane): Junior, what time of evening did you come to town that night?

A. Late. Pretty near—I went down about 11:30 and stayed at Pete's about a half hour, and about midnight they called "fire."

Q. You hadn't been downtown earlier in the evening or near Ferguson's building or near the restaurant?

A. No.

Q. How cold was it that night, Junior?

A. It wasn't too cold. I wore a light jacket, my field jacket.

Q. Well would you say thirty or forty below?

A. That's pretty good. About thirty or forty below, yes.

Q. Now I just wanted to ask you, Junior, about these. Well I will come back to something else. I heard you say something about drilling a hole in the ice. Was that hole in the ice—did you boys drill that so you could get water out of it for your buckets, or did you have the pumper down there that night?

A. They carried water in buckets.

Q. You just used buckets in the old fashioned

(Testimony of Whittier Williams Jr.)

way? You didn't get the pumper down to the fire?

A. I didn't go out after I go into the building. I didn't bother to go out.

Q. Now you talked about working up in this hole where the fire was. First, I will ask you about Steve Salinas. They asked you about how he was dressed, I believe. Do you remember how Steve was dressed that evening?

A. He was wearing his down parka and a suit.

Q. You have known Steve quite awhile?

A. That's right.

Q. He was dressed about as he usually dressed?

A. That's right.

Q. Didn't have any rough clothes on, or working clothes, anything of that kind? Just his down parka and a suit, and if he had boots on over his ordinary shoes—like he is dressed now in other words? Is that correct?

A. Well I don't think he was wearing a tie. He wouldn't be wearing a tie that evening.

Q. Now, Junior, where these men were working, putting the fire out, up in where the trap door goes up into the attic, did I understand you to say you formed a bucket brigade, and you were trying to get water up there?

A. Yes. They used buckets, and some fire extinguishers.

Q. How big is that opening up there approximately? A. Just right for a man to climb up.

Q. Just right for a man to climb up?

A. That's right.

Q. Would there be an opportunity for more than

(Testimony of Whittier Williams Jr.)

one—for instance, if you were packing water to me and I was handing it to somebody, there probably wouldn't [126] be room for more than one would there? A. One guy up there.

Q. And one guy packing to him?

A. That's right.

Q. Only one guy working in the fire; there wasn't room for Steve or anybody to get in there and help? A. No.

(There were no further questions and the witness was excused from the stand.)

ABRAHAM KOWUNNA

is then called as the next witness for the plaintiff, and after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hermann): Would you please tell the Court and Jury your full name.

A. Abraham Kowunna.

Q. Where do you live, Mr. Kowunna?

A. Kotzebue.

Q. How long have you lived there?

A. Four years now.

Q. Were you living there last December?

A. Yes.

Q. Do you recall where you were on the night of December 25?

A. I was in Pete Lee's pool room.

Q. What time did you arrive at Pete Lee's pool room, about? A. About nine o'clock. [127]

(Testimony of Abraham Kowunna.)

Q. About how long did you remain there?

A. Not more than a half hour.

Q. Was there any particular reason you left at that time? A. Somebody was hollering fire.

Q. What did you do when you heard somebody holler fire? A. Run out.

Q. Where did you go?

A. To that restaurant.

Q. Do you know the name of the restaurant?

A. Yes. Kotzebue Grill.

Q. What was the first thing you saw when you got to the Kotzebue Grill?

A. I talked to Joe; I saw Joe first.

Q. Joe who? A. Brantley.

Q. Where was he when you saw him?

A. Getting buckets.

Q. Where was he?

A. Right next door, Ferguson's.

Q. Ferguson's store? A. Yes.

Q. Where did he go from there?

A. Right to the Grill.

Q. What part of the Grill?

A. Downstairs, getting some water.

Q. Did he go in the downstairs? [128]

A. Yes.

Q. Did you go in with him?

A. Not at that time.

Q. How long was he in there?

A. Not more than ten minutes.

Q. What did you do after Joe came out?

A. Followed him right upstairs.

(Testimony of Abraham Kowunna.)

Q. Where did you go upstairs?

A. Where the smoke was coming out.

Q. Do you know which end of the building that was? A. Yes.

Q. Which end was it?

A. Right at this end (indicating).

Q. That would be the back end or the front end of the building? A. The back end.

Q. Could you see the fire? A. No.

Q. How far back did you go in the building?

A. It was pretty long, so we had to go all the way back.

Q. Did you go in the back room? A. Yes.

Q. What did you see in the back room?

A. Smoke coming out of the attic and the fire.

Q. How could you see in the attic?

A. You could see the flames. [129]

Q. Was there an opening to the attic?

A. Yes.

Q. Did you see anything else in that room?

A. Yes. A five-gallon can of Blazo.

Q. Where was the five-gallon can of Blazo?

A. Right next to the two cases of something that was stacked up.

Q. Where was that located?

A. Right under the attic.

Q. Well, what did you do after that?

A. We started pouring water—hauling water up there.

Q. Where did you get the water?

A. They made a hole in front of the restaurant.

(Testimony of Abraham Kowunna.)

Q. In the ice? A. Yes.

Q. Now do you know what happened to the chair and the can of Blazo while the fire was going?

A. Somebody else must have taken them out.

Q. Do you know who took them out?

A. No.

Q. Now did you smell anything in that back room?

A. No, not while we was working — we could smell the smoke.

Q. Were you ever in that room after the fire?

A. Yes.

Q. About when was that?

A. About five days later. [130]

Q. Were you alone or were you with someone?

A. Yes.

Q. Who were you with?

A. Three marshals.

Q. What did you smell on that occasion?

A. Gas.

Q. Where did you smell the gas?

A. Right where the attic was.

Q. Whereabouts in relation to the opening into the attic? A. Not too far.

Q. Did you see anything in the opening to the attic at the time of the fire?

A. I didn't get that.

Q. Did you see anything in the opening from the room to the attic at the time of the fire?

A. No.

Q. You didn't see anything at all? There wasn't

(Testimony of Abraham Kowunna.)

anything in that opening?

A. There was flames; that's all I saw.

Q. Were there any objects there?

A. I seen a cord hanging down.

Q. How long a cord was that?

A. I don't remember.

Q. Do you remember what color it was?

A. Yes.

Q. What color was it? A. Black. [131]

Q. Did you see Mr. Salinas at all during the fire? A. Yes.

Q. Go ahead.

A. He was helping down there with the buckets.

Q. How long did he stay there? Do you know?

A. No.

Q. Was he there as long as you were?

A. I don't remember.

Q. Did you notice whether Mr. Salinas seemed excited or calm, how he appeared?

Mr. Taylor: Just a minute, your Honor. That's calling for a conclusion as to appearance and state of mind.

The Court: Same ruling, counsel. The same ruling. I am referring to the matter of observation, not opinion or conclusions as a matter of law. He may answer.

Q. (By Mr. Hermann): How did he appear at the fire? Was he calm or excited, or just how did he appear? A. Calm, I guess.

Q. Do you know whether or not he stayed until the fire was out?

(Testimony of Abraham Kowunna.)

A. No. I didn't watch that time.

Q. Did you see Mr. Brantley during the fire, while you were fighting it?

Mr. Crane: Leading and suggestive, if your Honor please, suggesting the answer.

Q. (By Mr. Hermann): Did you — would you state whether or not you saw Mr. Brantley [132] during the fire?

A. Yes. I was working with Mr. Brantley.

Q. What kind of work was he doing?

A. I was passing water to him.

Mr. Hermann: No further questions.

Cross Examination

Q. (By Mr. Crane): What time did you come down town Christmas, do you remember?

A. I don't remember.

Q. You don't know how long you had been around Pete Lee's prior to the fire?

A. How long in where?

Q. How long you had been around Pete's prior to the fire?

A. Not more than just before show time.

Q. Since just before show time?

A. That's when they start the show time, I go to Pete Lee's.

Q. Then you remained there all evening?

A. Yes.

Q. The show started about what time, about seven or seven thirty up there? Is that right?

A. 8:15 on Sundays and Wednesdays 8:15, and it would be 8:15 Christmas.

(Testimony of Abraham Kowunna.)

Q. And it would be 8:15 Christmas?

A. I guess so.

Q. If you remember, did this fire occur after the show was out or was the show still going on when the fire occurred?

A. The show was still going on. [133]

Q. The show was still going on when the fire occurred?

A. Yes.

Q. As I understand your testimony then, a bunch of you boys were over at Pete Lee's and someone called in and hollered fire and then you all went over to Steve Salinas'?

A. Yes.

Q. Was there a crowd at the fire before you boys got there from Pete Lee's—How many of you were there?

A. I don't know, six or five of us.

Q. Five or six of you from Pete's went over to the restaurant and the restaurant was on fire?

A. Yes.

Q. You say that was probably just before the picture show was out?

A. Yes.

Q. That would make it around ten or 9:30?

A. About nine o'clock.

Q. About nine o'clock?

A. Yes.

Q. Well didn't the fire occur later than nine o'clock?

A. After nine I guess.

Q. After nine?

A. Yes.

Q. Did you see when you went there—the District Attorney asked you if Steve was calm or excited. How long have you known Steve Salinas?

A. I know him since he came down there. [134]

Q. I will ask you, did Steve act any different

(Testimony of Abraham Kowunna.)

around the fire than he acted around the restaurant and at any other time.

A. He acted quite calm.

Q. Didn't show any undue excitement?

A. No.

Q. I wonder if you can describe for me—did you see in the room where the fire was—you say that you were fighting the fire up in the attic—where was that hole in the attic? Closer to one wall, the center of the room, or about what part of the room was the trap door that goes up in the attic?

A. The end of the room to that side (indicating).

Q. The end of the room to that side? More in the corner of the room? A. Right.

Q. Now I will ask you, the night of the fire, you testified there was a box on top of a box. There was a case of canned goods along side of the chair. There was another case of canned goods, and I believe a Blazo can on the floor. I will ask you this: Did you see, was all that left out in the open, in plain sight, so you could see it all right in front of you?

A. Yes. It was all left out in sight.

Q. All left out in plain sight? A. Yes.

Q. This cord that you say was coming out of the attic, you say it was about a three inch cord, or three or four inches exposed?

A. I don't know.

Q. You never personally examined the cord?

A. No. [135]

(Testimony of Abraham Kowunna.)

Q. You don't know of your own knowledge, do you, whether it was connected with anything or whether it was just something hanging down, or just what it was? A. No.

Q. Was the marshal there at the fire that night?

A. Right after that, yes.

Q. After the fire? A. Yes.

Q. But he wasn't there at the fire?

A. I don't remember that.

Q. I mean, did you see him around in the room where you were fighting the fire? A. No.

Q. Didn't see him in evidence? A. No.

Q. Did you see Gene Starkweather or Tommy Goodwin? A. I didn't see Gene.

Q. Did you see Tommy? A. Yes.

Q. That was in the upstairs room where you was fighting the fire? Tommy Goodwin was up there?

A. Yes.

Q. Were you up there when Harold Little disconnected, or put the lights back on so you could fight the fire? A. That time I was outside.

Q. You were helping outside? A. Yes.

Q. Now when you first came downtown early in the evening from up where you live, did you come down—so the jury will understand what we mean—there is a street running up and between the post-office and the restaurant toward the bay, is there not?

A. Toward the bay, Kotzebue Sound.

Q. What I mean, this street that runs between the Kotzebue Grill and the postoffice, runs out to-

(Testimony of Abraham Kowunna.)

wards Rexfords (indicating), like this. Here is the Bay out here (indicating), and here is Front Street (indicating), and here is Pete Lee's place over here (indicating), is it not. A. Yes.

Q. All right. When you came downtown did you come down this way (indicating), or did you come down the waterfront to get to Pete's?

A. Right along the waterfront.

Q. Did you come down around eight o'clock at night, something like that?

A. A little earlier than that I guess.

Q. All right. When you came down the waterfront, you came from what part of town, did you come down past the postoffice part, the Grill, or turn up to Pete Lee's, or come up the other way, or just how?

A. Down the waterfront, right by the postoffice and Pete Lee's.

Q. And turned at the postoffice? A. Yes.

Q. All right. When you made the turn at the postoffice, looking over toward the Kotzebue Grill, was the place open or closed at that time of night?

A. There is no light in it.

Q. No lights. Now did you get a chance to look at the complete picture? Did you get a chance to look at the front room upstairs when you was walking along, the front room facing Kotzebue Sound?

A. No.

Q. Did you see any lights upstairs when you came along? A. No.

Q. If there had been lights upstairs would you

(Testimony of Abraham Kowunna.)

have seen them, ordinarily? A. Sure.

Q. Then the upstairs part of the place was dark at the time you came along there? A. Yes.

Q. You say Steve was up there helping you at the fire? A. Yes.

(There were no further questions and the witness was excused from the stand.)

(Thereupon, at 4:50 p.m., the Court duly admonished the jury and adjourned for the day.)

Be It Remembered that at 10:00 a.m., April 23, 1958, court reconvened and the trial of this cause was resumed. Defendant was present together with counsel Mr. Taylor and Mr. Crane; the Government was represented by Mr. Russell R. Hermann; the Honorable Walter H. Hodge presiding. [138]

The Court: We will resume the trial this morning in the case of United States vs. Salinas. I expect we had better call the roll of the jury.

(The roll of the jury was then called; all jurors were present.)

The Court: We will proceed with the Government's case.

SAM HENRY

is then called as the next witness for the plaintiff, and after being duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Hermann): Mr. Henry, would you please tell the Court and jury your full name?

(Testimony of Sam Henry.)

A. Sam Henry.

Q. Could you speak a little louder, please.

A. My name is Sam Henry.

Q. Where do you live? A. Kotzebue.

Q. Could you speak a little louder.

A. Kotzebue.

Q. Were you living there last December?

A. Yes.

The Court: Pardon me. Just a moment.

Q. You say you were living in Kotzebue last December? A. Yes.

Q. Were you at the Kotzebue Grill last December 25? A. Yes. [139]

Q. About what time did you go to the Kotzebue Grill? A. Well I was kind of late.

Q. I am having trouble hearing you.

A. It was kind of late when I got there.

Q. About how late, do you know?

A. I don't remember what time.

Q. Where were you just before you went over to the Grill?

A. Well, I was running a movie for the guys.

Q. I am having trouble hearing you again.

A. I was running a movie for Ray.

Q. Do you know whether it was after the picture or before the picture that you was over there?

A. Well, we had two reels—just when it ended.

Q. I can't hear you at all. Would you speak up a little bit. Would you repeat that, please.

A. Just on the last reel.

Q. What time is the last reel usually over?

(Testimony of Sam Henry.)

A. Somewhere after ten.

Q. What did you do when you got to the Grill?

A. I started helping them guys passing water.

Q. Were these people there when you arrived at the Grill? A. Yes.

Q. Where were you at when you were helping pass the water? A. Well, I was on the hall.

Q. What? A. I was on the hall. [140]

Q. While you were there, did you at any time see Mr. Salinas? A. He came around later.

Q. He came in later? How much later?

A. I don't know; I don't remember.

Q. Where were you when you saw Mr. Salinas?

A. Well, I was passing water right on the hall there.

Q. In the hall? A. Yes.

Q. Did Mr. Salinas say anything at all that you heard?

A. Well, he said, "It's too far gone now. Let it burn" or something like that.

Q. Would you repeat that please.

A. He said, "It's too far gone now. Let it burn" or something like that.

Q. What did you do after he said that?

A. Well, we kept passing water.

Q. How long did it take to put out the fire?

A. I don't know how long.

Q. Did you see Mr. Salinas fight the fire?

A. No. Just stand there.

Q. Pardon me?

A. He just stand there.

Mr. Hermann: No further questions.

(Testimony of Sam Henry.)

Cross Examination

Q. (By Mr. Crane): When you speak of the hallway, Sam, which hall do you mean? The hallway upstairs between the rooms, or the hallway downstairs? [141] A. Upstairs.

Q. You say that you didn't see Steve Salinas until after the fire had started?

A. He got there later.

Q. Do you know whether or not he was downstairs before, thawing out pipes so you could get water? A. I don't know.

Q. Where did you get the water from so you could fight the fire?

A. Well, they were packing it from downstairs.

Q. Downstairs in the building or downstairs outside? A. I don't know.

Q. The water was being packed in large buckets or small containers or what?

A. There was some small and large buckets.

Q. Who was packing water to you?

A. There was a bunch of guys there.

Q. Now while they were passing the water, how long had the fire been going on before you saw Mr. Salinas?

A. I don't know. He came in just before the fire went out.

Q. In other words, Mr. Salinas came in just before the fire went out? A. Yes.

Q. Now at that time, didn't he say, Sam, "There is no need of fighting any more. We have it smothered out"? A. No.

Q. Isn't that what he said? [142] A. No.

(Testimony of Sam Henry.)

Q. Didn't he say there was no need of packing any more water?

A. No, I didn't hear him say that.

Q. How long did you remain around the fire?

A. After the fire went out, I went home.

Q. Do you know or not that Steve Salinas was downstairs after he talked to you? After he talked to you, did Steve Salinas go on downstairs?

A. I don't know.

Q. Do you know whether, when you talked to him, he had been in the hallway, whether he had been downstairs or had come up and was talking to you in the hallway? A. No.

Q. You don't know whether Mr. Salinas, prior to your conversation with him about the fire, was working in the lower part of the building with a blowtorch to see if they could get the water lines thawed out downstairs?

Mr. Hermann: If your Honor please, I object to the form of the question. He has repeated it three times.

The Court: Well that is permitted to a certain extent in cross examination. He may inquire.

Q. (By Mr. Crane): You may answer the question Sam. Was he thawing it out so they could get water to the fire? A. I don't know.

The Court: Will you speak up a little. We cannot hear you.

A. I don't know that. [143]

Q. (By Mr. Crane): How was Steve dressed that night?

A. Oh, he was dressed with his——

(Testimony of Sam Henry.)

Q. A little louder.

A. He was dressed up pretty nice.

Q. "He was dressed up pretty nice", is that your answer? A. Yes.

Q. When you say he was dressed up pretty nice, what did he have on? Just what did you observe? I just want to test your memory.

A. Well he had a parka on.

Mr. Crane: That's all.

Mr. Hermann: No further questions.

(There were no further questions and the witness was excused from the stand.)

CLARENCE GREGG

was then called as the next witness for the plaintiff, and after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hermann): Mr. Gregg, would you please tell the Court and jury your full name.

A. Clarence Gregg.

Q. Where do you live, Mr. Gregg?

A. Grace Taktu's place.

Q. Where is that? What town?

A. You mean where I come from?

Q. Yes. A. Kotzebue. [144]

Q. How old are you? A. 18.

Q. Were you living in Kotzebue last December?

A. Yes.

Q. Do you recall where you were on the evening of December 25? A. Yes.

(Testimony of Clarence Gregg.)

Q. Where were you that night?

A. Daniel Stockers.

Q. Do you know what time you went to Stocker's? A. What?

Q. Do you know what time you first went to Stocker's that evening?

A. No. I was there all evening.

Q. Did you arrive early in the evening or late in the evening?

A. I was there early in the evening.

Q. Do you know what time you left Stocker's?

A. No.

Q. What did you do when you left Stocker's?

A. That's when Margie Lincoln came in and said the restaurant was on fire.

Q. Do you know what time that was?

A. No.

Q. How far is Stocker's from the Kotzebue Grill?

A. It's right on the same street, going right straight down, and you go to the restaurant.

Q. About how many blocks, if you know? Do you know?

A. Well here is the restaurant (indicating), and you go up the street and right at this corner there is Dan Stocker's place. [145]

Q. What did you do when you got to the Grill Building? What did you first do?

A. They were forming a line up to the roof; that's where I went.

Q. Up to the roof? A. Yes.

(Testimony of Clarence Gregg.)

Q. What did you do up by the roof?

A. I wasn't by the roof: I was down by the door, by the next building, right between the restaurant and Ferguson's store.

Q. I see. What did you do there?

A. Well, I was passing water to the next guy.

Q. Where was the water coming from?

A. Ferguson's store.

Q. I see. Could you see them throwing the water on the roof? A. Yes.

Q. Was it having any effect that you noticed?

Mr. Crane: I object to that, if your Honor please. It's incompetent, irrelevant and immaterial, what effect it was having.

The Court: I cannot see where it would be either incompetent, irrelevant or immaterial. Which do you mean?

Mr. Crane: It's immaterial what effect it was having on the fire.

The Court: Wait a moment now. Maybe it is immaterial.

Mr. Hermann: I think it goes to show the state of the fire at the time he was there.

Mr. Crane: The man said he was downstairs and passing water upstairs. [146]

The Court: I do not think upon reflection that it is material.

Mr. Hermann: It would go to the state of the fire at the time he was there.

The Court: Do you propose to show whether there was a fire?

(Testimony of Clarence Gregg.)

Mr. Hermann: No. To show what the state of the fire was when he was there, how long the fire may have been burning, to show how hot the roof was. He was one of the first ones there.

The Court: Well I didn't have in mind that there was any dispute there as to whether there was a fire. But now, as to whether, when the fire was first noticed, whether it was hot, and had been burning——

Mr. Crane: Well, if your Honor please, this witness has not shown that he was in position to know.

The Court: I still can't see the materiality of it, counsel.

Mr. Hermann: Very well.

Q. (By Mr. Hermann): How long did you stay in that place beside the building?

A. Until the boys said they couldn't turn off the fire from the roof.

Q. What did you do then?

A. Some of us boys was going upstairs to the next floor.

Q. To the next floor?

A. Yes. To the second.

Q. What happened after you went upstairs to the next floor?

A. Some of the boys were going to break down the door, but Joe Brantley came along and opened it. [147]

Q. What did you do after it was opened?

A. There was some boys ahead of me and I went in; they were way ahead of me.

(Testimony of Clarence Gregg.)

Q. How many boys? A. I don't know.

Q. What did you do then?

A. I don't remember.

Q. Well, where did you go then?

A. We went to the hallway, and there was an attic, and some of the boys went through that attic, and the rest of the boys went to the room where the fire was above the ceiling.

Q. Where did you go yourself?

A. I was in the hall entrance.

Q. The hall entrance. Did you go in the back room at all? A. Yes, I did.

Q. What did you see in the back room?

A. I couldn't see anything when I went in there first.

Q. Did you see anything later on?

A. Yes, after the fire.

Q. What did you see then?

A. There was a cord hanging down from the attic.

Q. What kind of cord?

A. One of these cords they used for—something like they use for coffee pots.

Q. How long a cord was that? [148]

A. About this long (indicating).

Q. Just exactly where was that cord, Mr. Gregg?

A. Hanging down from a corner of the attic.

Q. In what room would that be?

A. That was in the back room.

Q. I see. Now while you were up there did you see Mr. Salinas?

(Testimony of Clarence Gregg.)

A. While I was in the hallway.

Q. Do you recall whether or not he said anything at that time? A. Yes.

Q. What did he say?

A. He said "let it be. It's too far gone" when we were fighting the fire.

Q. How long after that was it before the fire was out? A. It was right in the middle.

Q. What did you do after the fire?

A. Steve said for us to clean up the place.

Q. What did he say to you in that respect?

A. He said for us to clean up the floor, get it clean, and he said he would pay us.

Q. What, exactly, did he say in that respect.

A. I don't remember.

Q. Do you recall whether or not any mention was made of the wiring? A. What?

Q. Do you recall whether or not he made any mention of the wiring?

A. No. Oh—yes. He told us—the wiring in the attic—he told us [149] to put the wiring about 16 inches apart.

Q. Did you do that? A. Yes.

Q. While you were in the attic did you detect any smell at all?

A. Not while I was in the attic, I couldn't smell anything.

Q. While you were fighting the fire?

A. Yes.

Q. What could you smell?

A. When we went in we could smell some gasoline.

(Testimony of Clarence Gregg.)

Q. I see. While you were working in the attic did you remove anything from the attic to any of the other rooms?

Mr. Crane: I object to that as leading, your Honor.

The Court: I think not; it does not suggest the answer. Objection overruled.

A. I don't remember.

Q. (By Mr. Hermann): Were any of the wires disconnected or removed from the attic?

Mr. Crane: That is objected to, if your Honor please, as immaterial and incompetent, unless it is first shown that he knows or that he moved them.

The Court: Well if the inquiry is whether he knows I think it would be proper.

Mr. Crane: There is nothing in evidence, your Honor.

The Court: You may answer whether you know whether any wires were removed. [150]

A. Yes. We threw a whole bunch of wires out.

Q. Where did you throw them?

A. On the beach.

Q. On the beach?

A. Yes. There is a bank-like on the road. We threw them outside the road.

Mr. Hermann: No further questions.

Cross Examination

Q. (By Mr. Crane): Clarence, so we can clear this up a little bit, I will hand you defendant's Exhibit No. 7 and ask you to look at that and see if you recognize it?

(Testimony of Clarence Gregg.)

A. That is the stairs up to the building.

Q. Now from that picture does that portray the part of the alley between the Ferguson building and Steve's restaurant? A. Yes.

Q. Now, then, as I understand your testimony, the water that was coming, was coming from the Kotzebue Mercantile across and into the Kotzebue Grill? Is that right, Clarence? A. Yes.

Q. And the water system was working in Ferguson's then? A. Yes.

Q. And you were getting water from Ferguson's and passing it through? A. Yes.

Q. Another thing I wanted to bring out, you say you were fighting the fire on the roof, at the fire at first? A. Yes. [151]

Q. That's the attic roof isn't it, Clarence?

A. There is a crack in the roof that they poured water in.

Q. Is that where the smoke was coming from?

A. Yes. There was some flames out of it.

Q. And you were pouring water in that crack, you boys from Danny Stocker's place? You were doing that?

A. There was boys from all over.

Q. How long was you fighting the fire on top of the roof before Joe Brantley come and opened the door to let you on the inside?

A. I didn't see him——

Q. You don't know how long? A. No.

Q. I take it from your testimony, Clarence, that for awhile you were pouring water on the roof be-

(Testimony of Clarence Gregg.)

fore you could get into the upstairs. Is that the way it was? A. Yes.

Q. And then after the door was opened, you started fighting the fire from the inside of the building? Is that correct? A. Yes.

Q. Now, if you can, point out to the jury, explain to the jury, from this photograph just where the entrance to Ferguson's would be in conjunction with the stairway to the building.

A. It would be right about here (indicating).

Q. Then you were bringing water across from Ferguson's and up this stairway after you could get in the building? [152]

A. Yes, there was some boys doing that; I was inside.

Q. In other words, you organized what we usually call in Kotzebue a bucket brigade?

A. Yes.

Q. Did you later on get a hole in the ice and start bringing water from down in the bay or down in the Sound, do you remember?

A. I don't remember.

Q. You handled the entire fire then by buckets and hand methods? What I mean, Clarence, where was the city pumper that night, our fire wagon up there?

A. I think it was up at Harold Jackson's place.

Q. Did it get down to the fire at all, as far as you know? A. No.

Q. It didn't get down there. Pretty cold that night, wasn't it? A. Yes.

(Testimony of Clarence Gregg.)

Q. If it did get down there, you fellows had the fire under control by bucket brigade prior, didn't you?

A. Yes. We had fire extinguishers too.

Q. Where did you get them?

A. They got them from all over the place; they just grabbed all the extinguishers available. They got them from Ferguson's, Alaska Airlines.

Q. Where else?

A. I don't know where else.

Q. Now while you were up there the fire was all confined to the rear room of the building in the attic, was it not? [153]

A. Yes.

Q. No fire in any other place of the building?

A. You know the rear room in the hallway—there was another room that was on fire too, of the attic.

Q. Where it had broken through?

A. There was a back building up there and there is that room in the hallway. They have a hall up there about that high (indicating) and it was burning around there.

Q. In the attic, in the upper part of the building?

A. Yes.

Q. The District Attorney asked you about some wires. What were those wires? Were they twisted wires, single strand or double wires, or just what kind of wires were they, if you remember?

A. I don't remember.

Q. You know Harold Little, the electrician, do you not?

A. Yes.

(Testimony of Clarence Gregg.)

Q. Wasn't it he who cut off the wire and rearranged them so you could get lights in the building? A. Yes.

Q. You spoke about this wire hanging down through the trap door. Was it connected to anything, or do you know?

A. Let's see. I don't know if it was connected with anything. It was hanging down and one of the boys grabbed it and pulled it off.

Q. You don't know whether it was tied into terminal or other wires or what? [154]

A. What?

Q. You don't know whether it was connected into any other wires or tied into any wires? In other words, you know nothing about it except that it was a loose wire and it was pulled down?

A. Yes.

Q. These wires that you threw out—were these the wires that Harold Little cut off?

A. I don't know which ones he cut off. There was Claude Wilson there. He was up with Harold Little, I think.

Mr. Crane: That's all of this witness I think.

Redirect Examination

Q. (By Mr. Hermann): Do you know when it was that the fire extinguishers were brought?

A. No.

Q. Were they there when you first started fighting the fire upstairs? A. What's that again?

Q. Were they there when you first started fighting the fire upstairs? If you know?

(Testimony of Clarence Gregg.)

A. Unh-nuh. We had the buckets up there first; next they got the fire extinguishers, next they started using the fire extinguishers.

Q. Do you know where it was that Mr. Little cut these wires? A. What's that again?

Q. Do you know where it was that Mr. Little cut the wires? A. No.

Q. Where were you at the time he cut them?

A. I think I was warming up inside Steve Salinas room. [155]

Q. Then you didn't see Mr. Little cut the wire?

A. There was Claude Wilson up there with him I think.

Q. You don't know what room it was they were cut in?

A. In the hallway room I think. Yes, the second from the rear.

(There were no further questions and the witness was excused from the stand.)

HAROLD LITTLE

was then called as the next witness for the plaintiff, and after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hermann): Mr. Little, would you please tell the Court and jury your full name?

A. Harold G. Little.

Q. What is your occupation?

A. Electrician.

Q. Do you have any credentials as an electrician? A. Yes, sir.

(Testimony of Harold Little.)

Q. What type of credentials do you have?

A. Journeyman.

Q. How long have you followed the trade of electrician? A. Since 1950.

Q. Are you still following that trade?

A. Yes.

Q. Have you had any special training as an electrician? A. Yes.

Q. What type? [156]

A. Well, it's been—I went through radio school and through some college.

Q. You studied electronics? A. Radio.

Q. To me that's electronics. Where do you live, Mr. Little? A. Kotzebue.

Q. How long have you lived in Kotzebue?

A. Four years.

Q. Do you know a building known as the Kotzebue Grill? A. Yes.

Q. Have you ever worked in that building as an electrician? A. Yes.

Q. On how many occasions?

A. Oh, a couple of times; a couple or three times.

Q. Over how long a period of time were those two or three times? A. In the last year.

Q. Do you feel that you are familiar with the building as far as the wiring goes? A. Yes.

Q. Will you state whether or not you were in the Kotzebue Grill on the night of December 25?

A. Yes.

Q. Will you state whether or not—how did you happen—

(Testimony of Harold Little.)

A. December 25—the night of December 25, yes I was there.

Q. You say the night and early morning of the 25th and 26th? A. Yes.

Q. How did you happen to go to the Grill on that occasion? [157]

A. I was called out for a fire.

Q. Do you recall what time it was that you were called out for the fire?

A. Around ten maybe; somewhere in there.

Q. Do you recall who called you?

A. Yes. Margie Lincoln.

Q. What did you do when you went to the Grill? What was the first thing you did?

A. Well, I entered on the north door, through the kitchen and through the hallway, and from there straight on upstairs.

Q. What did you do when you arrived upstairs? What was the first thing you did?

A. Well things appeared ordinary at that time; I mean nothing was going on, and I looked, went into the fire area and seen what was going on there and I took it that we couldn't hardly hold the building. I assumed the building couldn't be held.

Q. You mean the fire couldn't be stopped?

A. It didn't look very good. There wasn't very much to do any firefighting with.

Q. Were you able to tell where the fire was, what area? A. Yes.

Q. What area was that?

A. In the attic.

(Testimony of Harold Little.)

Q. Had it spread to any of the lower rooms?

A. No.

Q. What portion of the attic was it in, if you know? [158]

A. It was in the rear of the building.

Q. How big an area did the fire cover, if you know? A. Well I didn't investigate that much.

Q. Would you tell us what you did as far as investigating the fire goes?

A. Well, there are two trap doors there, and I did open the rear door. I was out in the hallway. I opened that and I did receive smoke from there. I closed it. I doubt if anybody even noticed me doing that. That's why I said I didn't think we would save it. It looked like it was spread larger than it actually was.

Q. Do you recall whether or not you saw Mr. Brantley at the time you first arrived at the fire?

A. Yes. He was in the attic.

Q. In the attic? A. Right in the hatch.

Q. Which hatch was that? A. The rear one.

Q. By rear one, do you mean the one in the hallway or in the room? A. In the far end.

Q. In the room? A. Yes.

Q. Now did you see Mr. Salinas about that time?

A. Yes.

Q. Did you talk to him? A. Yes, I did.

Q. What did you say to him, and what did he say to you? [159]

A. I stated that we might get ready to move all the fixtures out, and so forth.

(Testimony of Harold Little.)

Q. Did he say anything?

A. Well no—I mean everything was pretty well confused—a lot of excitement—and I mean you don't wait around to explain things. That was just the point.

Q. Well, do you know whether or not Mr. Salinas did anything to remove the fixtures?

A. No. Because I left at that time, and grabbed some pails and went downstairs to get some more water started there.

Q. To your knowledge were there any fixtures removed?

A. No. But everything was getting ready to be removed.

Q. Who was getting them ready?

A. Well, there was a guard posted and so forth. I mean everything was being organized, I mean.

Q. It takes a few minutes to get things going?

A. Yes.

Q. Well, what did you do for the remainder of the time that the fire was being put out. Just describe it briefly.

A. Well, I went downstairs because somebody said they could get water out of the water barrels downstairs, so I went down there and I relieved Gene Starkweather.

Q. Where was Mr. Starkweather?

A. He was down bailing out water out of the drinking cans. There was four barrels there.

Q. In what room? [160]

A. This was the kitchen area, and they had

(Testimony of Harold Little.)

filled up a garbage can, and I think he went up with it. At least they had gotten that filled up, and I think he was one of them that went up with the garbage can.

Q. Well, do you recall what time it was the fire was finally extinguished?

A. Well not particularly; I mean an hour or hour and a half.

Q. About what time would that make it?

A. Oh, 11:30 to 12:00.

Q. Did you remain after the fire?

A. No. While I stayed around for some time, I did go back to my house.

Q. Were you ever back in the Grill on that night? A. Yes.

Q. About what time was that?

A. Charlie Wilson came over to get me, and Steve told him, for just a few minutes, to get the lights back on in the building.

Q. Then you went there at Mr. Salinas' request? A. Yes.

Q. What did you do in that respect, you say, getting the lights back on?

A. Well, the lights went out during the fire, and I climbed up through the burned area with a flashlight, and there was one native boy with me. I don't recall who he was but I know he was up there with me and I cut two wires off from the burned area.

Q. Whereabouts in the building did you cut the wires?

(Testimony of Harold Little.)

A. Well, it would be approximately over the hallway.

Q. Over the hallway? Where would it be in relation to the hallway trap door? [161]

A. About the same—I imagine within five or six feet.

Q. How far would this be from the burned area?

A. Well it would be twelve or fourteen feet. There is a partition in between, a kind of half partition.

Q. Well, would this be on the other side of the partition from the burned area?

A. Yes. The partition is approximately two and a half feet high, and the wires was cut off on that side.

Q. Now do you recall whether or not you saw Mr. Salinas on December 26? A. Yes.

Q. Where did you see him?

A. Well, he was around my place there I know.

Q. At your house? A. Yes.

Q. How far was your house from the Grill?

A. Oh I imagine approximately 225 feet.

Q. I see. When you saw him at your house on the 26th, what was discussed at that time, if anything?

A. Well, they wanted the place rewired, and I said I would help supervise it.

Q. Was anything discussed in regard to the fire itself? A. Well, yes, in general.

Q. What did Mr. Salinas say in that respect?

(Testimony of Harold Little.)

A. Well not too much came up on the 26th.

Q. Did Mr. Salinas give any opinion as to whether or not the fire had [162] been a set fire or accidental fire?

A. Well I couldn't really say. It was assumed that it was set. Everybody assumed that, even that night.

Q. Do you know whether Mr. Salinas assumed that while you were talking with him?

A. That I don't know.

Q. Did he say anything in respect to gasoline or anything of that nature?

A. I don't know if it was on that particular day, but there was a discussion later.

Q. What did he say in that discussion?

A. Well it's—you know—people get together, and I will say my place probably had at least fifty people coming through it during the day, and you know, it's a place where we sit around and talk, everything is discussed.

Q. What did he say?

A. Well I don't recall, I mean exactly.

Q. Do you recall that he had mentioned gasoline?

Mr. Crane: I object to that, if your Honor please. It's leading and suggestive. That's the second time counsel has asked him about gasoline.

The Court: Objection sustained.

Mr. Hermann: The witness hasn't said he has exhausted his recollection.

The Court: The question is leading. Objection sustained. [163]

(Testimony of Harold Little.)

Q. (By Mr. Hermann): Mr. Little, have you given a statement, previously given a statement to the marshal? A. Yes.

Q. In your opinion is that a correct statement?

A. Yes.

Q. Do you think it would refresh your recollection or your memory if you could see that statement?

A. No. I have seen it; I seen it yesterday.

Q. Was there anything in that statement in relation to Mr. Salinas discussing gasoline?

Mr. Crane: If your Honor please, I object. Counsel is cross examining his own witness.

The Court: I doubt if it is cross examination. He is trying to refresh his recollection by way of the statement. He may answer.

A. I think the District Attorney's day is wrong. Let's move up to the next day.

Q. (By Mr. Hermann): All right. What was said on the next day in that respect?

A. Well, Joe was in—that's Brantley—and it was discussed. I mean everything was discussed there and Joe says "well, if Steve done it, he could do a better job".

Q. What did Steve say?

A. Well, Steve did say he could have used a lot more gasoline if it was going to be done. [164]

Q. Do you recall what date that was?

A. At this time I don't know; I think it was the 27th.

Q. The 27th? A. I am not positive.

(Testimony of Harold Little.)

Q. Now did you have any conversation with Mr. Salinas with respect to the wiring after the 26th and 27th? A. Yes.

Q. What was that?

A. To what effect was that?

Q. Yes.

A. Well that was to rewire the place.

Q. And do you know what date that was he discussed that with you?

A. Well the night of the fire and the following day.

Q. Were you hired to rewire the place?

A. I was not. I was just to be supervisor.

Q. You were to supervise it. Who was to do the work?

A. Well, Tommy Goodwin, but of course we were to do it together.

Q. Were any final plans made for that?

A. Yes. We drug out the material and boxes and so forth, and we even took a panel over to the building.

Q. Was any rewiring actually done, to your knowledge? A. No.

Q. Do you know why it was not done?

A. Well Steve left right after that and things were kind of up in the air. [165]

Q. He left?

A. Yes. Things were kind of up in the air and we didn't know what to do.

Q. I see. Let's go back to the 25th of December. Do you recall whether or not you saw Mr.

(Testimony of Harold Little.)

Salinas at any time during that day?

A. Yes. I probably went into the hotel up there about one o'clock.

Q. Do you remember whether you saw him at that time? A. Yes, I did.

Q. Do you recall whether or not you saw him later that day? A. That I don't know.

Q. Where did you go when you finished at the hotel? A. Down at my place.

Q. What did you do then?

A. I went to bed.

Q. Is it possible he could have been in there without your knowing it? In your place?

A. It could have been very possible.

Q. Do you recall whether or not you saw Tommy Goodwin on the 25th day of December?

A. Yes.

Q. Where did you see him?

A. In his place and also mine.

Q. What time did you see him?

Mr. Crane: If your Honor please, I object to where he saw him, Tommy Goodwin, the day after the fire, the 26th.

Mr. Hermann: I intend to tie it in later.

The Court: The materiality does not now appear. However, he [166] says he intends to tie it in later.

Q. (By Mr. Hermann): Do you recall what time it was you saw him at your place?

A. Well, he was in there in the evening.

Q. About what time of evening? To the best of your recollection.

(Testimony of Harold Little.)

A. Well, he came in, I think, just before the fire, and him and Gene went out together.

Q. About how long before the fire?

A. Oh, it must have been twenty minutes. They went over to Stocker's to have coffee.

Q. Do you know whether or not Mr. Goodwin was in your house earlier that day?

Mr. Crane: Objection, if your Honor please. No foundation laid as to what Tommy Goodwin done, where he was or what he did.

The Court: Same ruling. It may be tied in later; if not, it will be stricken.

Mr. Hermann: Would the reporter read the question, please.

(The reporter then reads the previous question as follows: "Do you know whether or not Mr. Goodwin was in your house earlier that day?")

A. That I don't know.

Q. (By Mr. Hermann): Is it possible he could have been in your house without your knowledge?

A. Well I know a lot of traffic came in there; that's nothing unusual for my place. [167]

Q. You are not certain then who may have been in your house on the 25th? A. No.

Q. Do you know where Gene Starkweather was at the time you went to the fire?

A. Well Gene and Tommy left just a few minutes before.

Q. They were together?

A. They were together.

Mr. Hermann: No further questions.

(Testimony of Harold Little.)

Cross Examination

Q. (By Mr. Crane): Mr. Little, referring now to the Kotzebue Grill building, owned on Christmas day by Steve Salinas, what was the electric service—to start with a preliminary, what was the electric service into that building?

A. That was a four-wire system, three phase.

Q. Four wire, three phase? A. Yes.

Q. Now coming into the building, does it come in off a transformer into the building?

A. Transformers. Three of them.

Q. Branch transformers? A. Yes.

Q. Now the wire into the building, is it generally stranded, three wire, or single wire, or just explain to the jury what the wiring in the building is.

A. Well, this is an old building, and actually the wiring is very, very poor. Way under code.

Q. Do you know the carrying capacity of the wire in the building? What is your voltage?

A. Well, your three-phase is 110, 220, or whatever you want off of it.

Q. What—will that serve?

A. That up there I believe is 7200.

Q. 7200? A. Yes.

Q. Were there any other buildings served on this same circuit?

A. Yes. Off the transformer there is a pole—I would say the whole end of town, I would say, is off of that.

Q. All right. Now we will get down to grips with what type of service entrance was used into

(Testimony of Harold Little.)

the Grill? Explain if there is a switch there.

A. Well, this was a haywire set up. You have got a four-wire system and no conduit coming in. It was just more or less wrapped together and shoved out the building and hooked on. Then you have three meters, single phase meters, for three phase power.

Q. Is there any neutral or any ground?

A. Yes. You have to have a neutral, and your ground is the same.

Q. There is at that building such?

A. Yes.

Q. Now coming up to the building, what type of fuses were there in the building? In the fuse box, what amp?

A. Well they were plug in fuses and I think they were 30 amp.

Q. Now, Mr. Little, after getting a general idea of the building, coming to the upstairs of the building and getting near the area of the fire, [169] I want you to tell the jury what kind and type of wiring there was in that attic.

A. Well, you have two types of wiring up there; part of it is tube and knob. That is your distribution to your tube and knob wiring. From there it backs off into what you call BX, which is a very poor type of installation.

Q. Now did you notice any BX wiring in that attic? A. Yes.

Q. Did you notice after the fire whether the BX cable had the insulation burned off?

(Testimony of Harold Little.)

A. Yes, it was burned.

The Court: Counsel, now would be a convenient time for a recess, if you don't mind taking a recess.

(Thereupon, at approximately 11:00 a.m. the Court duly admonished the jury and recessed for ten minutes.)

After Recess

(At approximately 11:10 a.m. court reconvened and the trial of the cause was resumed. All necessary persons were again present and both counsel stipulated as to the presence of the jury. The *defendant* on the stand at the time of recess resumed the stand for further cross examination.)

Q. (By Mr. Crane): Mr. Little, I will hand you defendant's Exhibit 1 and defendant's Exhibit 2, which have been introduced into evidence as showing part of the interior of the back room. I want to call your attention to the plug-in sockets, and I will ask you to examine them and ask you if you are familiar with them? [170]

A. Yes.

Q. Do you know whether there were any female plug-ins in either one of those sockets?

A. I don't know.

Mr. Crane: I would like to have this marked for identification. If your Honor please, and Mr. Hermann, that is a book I have borrowed. I wonder if certain parts of it could be substituted if it is introduced in evidence and it could then be withdrawn.

(Testimony of Harold Little.)

Mr. Hermann: The electrical qualifications you can take judicial notice of.

The Court: Yes, but the jury cannot take judicial notice; only the Court can do that.

(A book, the National Electrical Code, is marked for identification as defendant's Exhibit No. 8.)

Q. (By Mr. Crane): Mr. Little, I will hand you defendant's Exhibit No. 8 for identification and ask you to examine that and please tell me what it is.

A. Well, it is the National Electrical Code handbook.

Q. Briefly explain to me just what is that book and how it is used by electricians.

A. That is a code book set up by national underwriters, and it is what we go by to make wiring safe.

Q. To do a safe job of wiring you are required to follow that code, are you not? [171]

A. Yes.

Mr. Crane: I would like to offer this exhibit at this time. Would you care to examine it, Mr. Hermann?

Mr. Hermann: I would object to it on the grounds he has not shown the relevancy of the thing. I don't doubt it is a good code or anything of that nature.

The Court: I do not know—I do not know that this witness was called upon to give any expert opinion. He was qualified as an expert but he was

(Testimony of Harold Little.)

asked no expert opinion that I could find.

Mr. Crane: Very well. I will recall him as my witness, as an expert witness later in the case.

Mr. Hermann: I have no objection to him using him as an expert.

The Court: If you have no objection he may proceed.

Mr. Crane: I still would ask him a couple of questions and put him back on as my witness.

The Court: Whatever you wish, counsel.

Q. (By Mr. Crane): You speak of BX wire in the attic. I will ask you one question and that is this: Isn't it a fact that BX wire is a fire hazard? A. Yes.

Q. And it has been outlawed by all underwriters and other electrical workers has it not?

A. No.

Q. It hasn't been outlawed? [172]

A. It has been tried for years to have it outlawed.

Q. Do you know by whom?

A. By the Trades, yes.

Q. Will BX wire set fire in an attic?

A. It has, yes.

Mr. Crane: That's all.

Redirect Examination

Q. (By Mr. Hermann): In what part of the attic was some of the BX cable burned off?

A. In the fire area.

Q. Do you know to your own knowledge whether

(Testimony of Harold Little.)

or not the plugs in the room, that is, the fixtures in the room, were alive, that is, wired up for juice?

A. Well, I never actually examined it; I never had occasion to.

Q. I see. No further questions.

Recross Examination

Q. (By Mr. Crane): Just a minute, Mr. Little. Just to clear something up here, didn't I understand, in order to get the lights on, in the upper part, that you had to cut the wire so you could put the lights in the rest of the building?

A. Yes.

Q. Didn't you have to isolate the part where the fire area was? A. Yes. I isolated that.

Q. Then there were live wires in that part where the fire area was?

A. I assumed they were.

(There were no further questions and the witness was excused from the stand.) [173]

ESTHER IPALOOK

is then called as the next witness for the plaintiff, and after being duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Hermann): Mrs. Ipalook, would you please tell the judge and jury your full name?

A. Esther Barman Ipalook.

Q. Where do you live, Mrs. Ipalook?

A. Kotzebue.

(Testimony of Esther Ipalook.)

Q. How long have you lived in Kotzebue?

A. All my life, till I got married.

Q. What is your occupation in Kotzebue?

A. You mean now?

Q. What is your occupation now?

A. Nothing, now.

Q. What was your last occupation?

A. Cooking.

Q. Where did you cook?

A. At Steve Salinas' and Rotman's.

Q. Would you tell us when you cooked at Mr. Salinas'? What months?

A. September 1956 until December 1957.

Q. What duties did you have in connection with your cooking?

A. Well, I just see that we had our supplies in, sent in; sent in orders, paid for them, and see that we were supplied with groceries.

Q. Would you tell us how the supplies were during the month of December? [174] Were there any shortages?

A. We were pretty low on a few groceries like—well, these things were bought from local stores—some things like flour, sugar and coffee, butter, shortening and so forth.

Q. Who ordered those customarily from Rotman's store? A. I did.

Q. Were those ordered on credit or cash, or how were they ordered in that respect?

A. Cash orders, paid in cash.

(Testimony of Esther Ipalook.)

Q. At what time would they be paid for customarily?

A. When they were delivered there to the Kotzebue Grill.

Q. Was anything delivered, ever received from Rotman's and not paid for when received?

A. No.

Q. Were there any other shortages, other than what you have mentioned, during the month of December?

A. We were short on oil until I put an order in, and I got our oil.

Q. When did you put the order in?

A. A few days before Christmas; I don't know what day.

Q. Pardon me?

A. A few days before Christmas when I got the order in for more oil.

Q. When did you first notice the shortage of oil?

A. We ordered oil every month whenever we run low.

Q. Did you say anything to Mr. Salinas regarding a shortage of oil?

A. Yes. [175]

Q. When was that?

A. It wasn't too long before; it wasn't too long before I went up and put in the order myself.

Q. About how long was it between the time you spoke to him and between the time you put in the order yourself?

A. Four or five days, I believe.

(Testimony of Esther Ipalook.)

Q. I see. Were there any other shortages, other than those items you have mentioned?

Mr. Crane: If your Honor please, at this time I am going to object to the testimony of this witness as to its materiality as to shortages in the restaurant of food. I cannot see where it has any bearing on this case at all, whether they had groceries there or whether they didn't. This man is accused of burning a building. He is not accused of being short in commodities at the restaurant. I can't see taking the Court's time up with it.

The Court: Very true. But it may be material on the question of intent or motive.

A. We were getting a little low on meat.

Q. (By Mr. Hermann): Any particular kind of meat? That you were getting low on?

A. We were short of hamburger, ground.

Q. Were there any other items besides that, that you were short of?

A. We had some meat in the back but we were out of ground round.

Q. Do you know whether or not any ground round had been ordered at the time you were short?

A. Pardon?

Q. Do you know whether or not any ground round had been ordered during this period you were short?

A. I did make out a meat order but I found out it wasn't sent.

Q. When did you make out the meat order?

A. It was sometime in December, about the mid-

(Testimony of Esther Ipalook.)

dle. It was before Christmas; I know that.

Q. How long before Christmas about?

A. About two weeks.

Q. How long does it ordinarily take an order like that to arrive, once it is sent?

A. About a week.

Q. I see. Did that order ever arrive, to your knowledge? A. No.

Q. Was there anything else ordered in addition to the hamburger at that time?

A. Yes. There was some other kinds of meat that we had orders for, but I don't recall.

Q. Was there anything besides meat that was ordered? A. No.

Q. Were there any other shortages at that time?

A. No.

Q. What was the main item of food that was sold in the Kotzebue Grill at the time you were cooking there? A. Meals. [177]

Q. What kind of meals?

A. Breakfasts, dinners.

Q. Were sandwiches sold there?

Mr. Crane: Objection, if your Honor please. It's leading and suggestive.

Mr. Hermann: All right.

Q. (By Mr. Hermann): Would you answer the question please. Was your answer yes?

Mr. Crane: If your Honor please, counsel is continually leading this witness.

The Court: I do not find it particularly leading.

(Testimony of Esther Ipalook.)

(To witness) Would you answer the question, please.

A. What was it?

(The Reporter then reads the previous question as follows: "Were sandwiches sold there?")

A. Yes.

Q. (By Mr. Hermann): What kind of sandwiches?

A. Hamburger sandwiches, any thing like that; tuna sandwiches, cold beef, cold pork.

Q. I see. Was there enough hamburger on hand to furnish the amount of hamburger sandwiches usually sold?

Mr. Crane: Objection to that as repetitious, and there is no particular time laid.

The Court: It is not necessarily repetitious. It may be [178] leading. I rather fear it is leading. Sustained on that grounds.

Q. (By Mr. Hermann): Mrs. Ipalook, are you familiar with the upstairs part of the Grill, the second floor?

A. Well I can't help know it. That's where the bathroom is; that's where the supplies was, in the room in back.

Q. About how frequently would you be up there while you were employed there?

A. Several times a day.

Q. Have you ever seen Mr. Salinas upstairs?

A. Yes.

Q. Whereabouts upstairs?

A. He would be in his room, his bedroom.

(Testimony of Esther Ipalook.)

Q. Where is his bedroom?

A. As I come down the hall I can't help but see him in the room. He would be in there either resting, writing or reading or something like that.

Q. Do you know whether or not he used the bed in that room? A. Yes.

Q. Do you know whether or not he has ever slept in that room to your own knowledge?

A. Yes.

Mr. Crane: Objected to, if your Honor please, as too indefinite if a man ever slept in a certain room. Let's confine it as to time.

Mr. Hermann: I have said during the time she was there.

Mr. Crane: She was there two years. [179]

The Court: The question is proper and relevant. But you might fix the time a little more definitely, counsel, as to when, if the witness knows, the room was so used.

Q. (By Mr. Hermann): When, if you know, was the room used for sleeping purposes? What months?

A. Not in December. I don't recall.

Q. When is the last time you recall it was so used?

Mr. Crane: Objection, if your Honor please. She said not in December.

The Court: Objection overruled. We are trying to meet the objection which you previously made, and to establish the time.

Q. (By Mr. Hermann): Would you answer the question, please.

(Testimony of Esther Ipalook.)

A. Sometimes I would see him upstairs in the afternoon, resting or reading or doing something like that, anytime during the day. I wouldn't know until I happened to make a trip upstairs.

Q. Was he using the room for resting purposes during the month of December, to your knowledge?

A. Yes.

Q. Do you know to your own knowledge whether or not anybody else, during the time you were employed there, lived upstairs?

A. Charlie Norton used to live there before he got sick.

Q. Do you recall when it was that he got sick?

A. In October; sometime in October. [180]

Q. Do you know whether or not he slept there at night? A. Yes. He slept there.

Q. When he left there, do you know whether or not he removed all of his property from there or not?

A. No, he did not. His personal belongings were still there.

Q. What kind?

A. His clothes, comb and toothbrush, and things like that on his table.

Q. Do you know whether or not anybody lived up there during the summer of last year?

A. Yes. A family that came up to cook, a lady and her children lived there.

Q. Do you know when they left, to your own knowledge?

A. I think they left in October, either September or October when they left.

(Testimony of Esther Ipalook.)

Q. Do you know when Mr. Salinas left? When he left Kotzebue after the fire?

A. He left on the 27th.

Q. Prior to the 27th had he ever said anything to you about himself leaving Kotzebue?

A. Yes.

Q. When was that?

A. It was in the month of December that he said he would be leaving sometime, but he didn't know when.

Q. Did he ever, at any time, give you any date when he would be leaving prior to the date he actually left? [181]

A. No.

Q. Now when he left were you to continue working at the Grill?

A. Yes.

Q. When did you terminate at the Grill?

A. Pardon?

Q. When did you quit working at the Grill?

A. After he left I was told that the wiring wasn't good, that it had to be rewired before we could ever open up for business.

Q. Then you never worked at the Grill after that?

A. No.

Q. Do you recall whether or not ice cream was served at the Kotzebue Grill?

A. Yes.

Q. Do you know what type of package the ice cream was served in?

A. Yes. They were in these two and a half gallon packages.

Q. Would you describe the packages?

A. Round, and about so high (indicating).

(Testimony of Esther Ipalook.)

Q. Do you know what would become of these containers when they were empty?

A. We saved some last year for some people, for some people in town that wanted them.

Q. Do you recall whether or not you saved any this year, in 1957? A. I saved three.

Q. When was that, that you saved those three, about when? A. Sometime in December.

Q. Have you been back to the Grill since the fire?

A. Well, I went over there to clean up a few days after the fire.

Q. Did you see any of those ice cream containers at that time? A. No.

Q. When was the last time you saw the three ice cream containers?

A. Sometime before Christmas.

Q. What would you do with these containers you saved? Where would you put them?

A. I set them in the back room, in the back where we had a cooler.

Q. I see. No further questions.

Cross Examination

Q. (By Mr. Crane): Esther, that restaurant up there known as the Kotzebue Grill, owned by Steve Salinas, where you worked, that's just the ordinary type of general restaurant, is it not? A. Yes.

Q. The purpose of it is to serve meals to the public? A. Yes.

Q. Some days you are probably short of some

(Testimony of Esther Ipalook.)

things; and some days long on other things? Is that right? A. Right.

Q. If you are short of any commodities you can always get them from Rotman's Store, is that correct? A. Yes.

Q. Now counsel just asked you about these ice cream containers. You say the last time you saw them was sometime before Christmas. Do you remember about [183] how long before Christmas it was the last time you saw them, approximately? You don't need to tie it down too definitely.

A. Not too long before Christmas.

Q. Where did you see them—back in the store-room? A. Yes.

Q. Did you notice any time before the fire that they were gone? A. No.

Q. You don't know whether they were still there? A. I don't remember.

Q. You don't remember whether somebody had taken them out or not?

A. No, I don't know when they—I didn't notice they were gone or not after I set them back there.

Q. About what time did you set them back there? A. As they were empty, one at a time.

Q. Esther, if they had still been there the last time you were in that room you would have seen them, would you not?

A. If I took time to look around I would have. But I had put them on a shelf and when I go in the back to get something I don't usually look all around the room. I just pick up what I went to get and come back.

(Testimony of Esther Ipalook.)

Q. The oil tank, that oil storage tank that you have at the restaurant is about a 1500 gallon tank isn't it?

A. Must have been. It's a large tank.

Q. When the oil gets down to a certain level, do you have somebody measure it then call up for oil?

A. Yes. [184]

Q. Isn't it a fact that at the time you called Steve to refill or called for oil, there was approximately 200 gallons in the tank? A. Yes.

Q. Now let's get to this room upstairs. You say that Steve would go up there sometimes in the afternoon and rest? A. Yes.

Q. Charlie Norton, according to your testimony, took sick along in the last of October. Is that about correct? A. Yes.

Q. He was taken from the place to the Kotzebue Hospital, was he not? A. Yes.

Q. Do you know of your own knowledge that he was evacuated from the Kotzebue Hospital and to Edgecumbe? A. Yes.

Q. You do know of your own knowledge that Charlie Norton hasn't been back in the building since last October? A. No.

Q. No. Has he been in Kotzebue since the last of November when they took him to the hospital?

A. No.

Q. Do you know in what condition he was when they took him to the hospital?

Mr. Hermann: We object to that, your Honor. It calls for a medical opinion.

(Testimony of Esther Ipalook.)

The Court: Well, hardly. [185]

Mr. Crane: I don't mean diagnosis.

Q. (By Mr. Crane): Had he had an accident, was he sick, mentally ill, or what was the occasion to take him to the hospital?

Mr. Hermann: Now, I think definitely——

A. He didn't look well; he looked like he was sick.

Q. (By Mr. Crane): Now about Charlie Norton's effects. You say some of his personal belongings are still in the building. As a matter of fact, Esther, there is no place else for him to leave them, is there, except up there? A. No.

Q. He hasn't any relatives or close friends that could come and get them, has he? A. No.

Q. I will ask you if it isn't a fact, and if you don't know of your own knowledge that that building has not been occupied for a dwelling house since Charlie Norton left in October?

Mr. Hermann: I object to the question, if your Honor please, which calls for a conclusion rather than anything she has seen or observed or has personal knowledge of.

The Court: The question raises a point of law which I should like to discuss with counsel, and I will ask the jury to please retire to the jury room for a few moments. You could step down, Mrs. Ipalook.

(The jury retires from the courtroom and the witness leaves the stand.) [186]

The Court: The jury being excused, I wonder if

counsel are aware of the amendment to this statute upon which the indictment is based and, if so, whether it is material at all as to whether or not this building was actually occupied as a residence or for dwelling purposes at the time of the fire. The 1957 amendment clearly provides that the crime of arson in the first degree, arson in a dwelling house, may be committed whether or not the premises are occupied, unoccupied or vacant. Now there was a previous statute which defined what was a dwelling house, and that was repealed by the same Act of the Legislature. So why is it material as to whether or not the place was actually occupied for a dwelling at the time of the fire? Mr. Taylor, you were in the Legislature at the time this amendment was made. Perhaps you could throw some light on it.

Mr. Taylor: Your Honor, under the present law, the first degree burning of a dwelling house, all we have to show is that it was not used for a dwelling. It must be used for a dwelling at the time of the fire.

The Court: That's not what the statute says as now amended. It says precisely the opposite. The amendment says whether occupied, unoccupied or vacant.

Mr. Taylor: But not a dwelling house. The restaurant has not been used as a dwelling house. The single room that one man slept in is not a dwelling house.

The Court: I have looked into this question and find the test is whether it is customarily used by any person for a dwelling [187] or a place to live.

It is not necessary that it be shown that it is so occupied at the time of the fire. That was probably true before this amendment was made.

Mr. Taylor: I think this too, because it is not primarily a dwelling. It is primarily a business building, if there was nobody in there that used it for a dwelling and it has not for some time been used as a dwelling.

The Court: You will find that there is ample law to the effect that the fact a building is used for other or business purposes in addition to a place for someone to live does not take away from the fact that it is a dwelling.

Mr. Taylor: But it must be the burning of a dwelling house.

The Court: Yes, certainly.

Mr. Taylor: At the time of the burning it was not a dwelling house.

The Court: At the time of the burning it was a dwelling house if it had been ordinarily or customarily used for that purpose. It is not necessary that it had been used for such that day. If it was abandoned as such that is a different story. There is ample authority on it, and I have looked into it rather carefully.

Mr. Taylor: We strongly contend, your Honor, that it is not basically a dwelling house; it is a business house and was used occasionally as a place for Mr. Salinas, and also his cleanup man who had become sick had a room there for awhile. Now the testimony is that it is mostly storage, and I don't think—— [188]

The Court: There is probably an issue there for the jury to determine, whether or not the building had been customarily, ordinarily used for dwelling purposes, but strictly speaking, whether it was so occupied at the time is wholly immaterial and I will have to so instruct the jury.

Mr. Taylor: I think, your Honor, we have also to say, if you hold that way you also have to hold that if it was not occupied it was not a dwelling, because the only thing carried on there was a business.

The Court: Well, that's not the law, counsel, not under this amendment. It would have been under the previous definition of arson. It could be under the common law; but just why the Legislature amended it I do not know.

Mr. Taylor: Under this Act when this building was vacated, your Honor, it reverted to a business building, not to a dwelling. It never was a dwelling, incidentally, because one person lived there, up in that room.

The Court: That makes it a dwelling, if one person alone lives in a dwelling. That's the law. If it is abandoned, it ceases.

Mr. Taylor: And it had been for over a month. Nobody slept up there.

The Court: The previous statute, which the Legislature expressly repealed, said "that any building is deemed a 'dwelling house' with the meaning of the sections of this act defining the crime of arson any part of which has usually been occupied by [189] any person lodging therein." Now the Act is

simply an expression of the common law. Now if they repeal it, as the Legislature did, then we are governed simply by the common law which is precisely the same thing—if it is “usually occupied.” But in addition to that the Legislature saw fit to provide that it need not be occupied at the time.

Mr. Crane: If your Honor please, I believe I can find some cases on this theory where it is primarily a business house with part of it being occupied as a dwelling, takes it out of the class of a dwelling house.

The Court: If you can find a single case to that effect I will be happy to see it, but I find the law is wholly the opposite.

Mr. Crane: I am not certain that I have it here.

The Court: If you can cite a single case, it will be contrary to authority as I find it. It is true that if the premises are abandoned for any living or dwelling purposes then it is no longer a dwelling. I think it has been clearly shown by the Government's witnesses that Charlie Norton—Well, there is a question to be put to the jury as to whether it was abandoned, and that is the only relevancy I can see of this type of testimony. We will call in the jury.

Mr. Crane: May we have a few minutes. We might ask—I was thinking I might look into——

The Court: Well, we will have a two hour recess soon. You should be prepared on important points such as this. You may call in the jury. [190]

(The jury returned to the box and the witness resumed the stand.)

ESTHER IPALOOK

resumed the stand.

Q. (By Mr. Crane): I will ask you just one more question, if you know. Has the upstairs of the Kotzebue Grill been abandoned as living and dwelling quarters?

Mr. Hermann: Objection, if your Honor please—

The Court: That calls for a conclusion of law. Objection sustained. You may show the facts. You said abandoned?

Mr. Crane: Yes.

The Court: You used the word “abandoned” and that is a question of law, not of fact.

Q. (By Mr. Crane): I will ask you then, if the upstairs of the Kotzebue Grill has been unoccupied, except for storage, since Charlie Norton left?

A. Yes.

Q. Now, Mrs. Ipalook, during November and December of 1957, as far as you know, did anybody eat upstairs? A. No.

Q. Did anybody use any part of the upstairs for housekeeping?

A. The washing, laundry is done upstairs.

Q. That was washing laundry for the restaurant, was it not? A. Yes.

Q. No individuals lived up there and used it?

A. No.

Q. That's all. [191]

Redirect Examination

Q. (By Mr. Hermann): Mrs. Ipalook, in re-

(Testimony of Esther Ipalook.)

gard to the groceries purchased from Rotman's, do you know to your own knowledge whether or not you were paying for them at wholesale rates or retail rates or any other type of rates?

A. Retail.

Mr. Taylor: We object, your Honor, to the method of payment for the groceries. It's incompetent, irrelevant and immaterial in this matter. She said they paid cash for them.

The Court: Oh, I rather think so. I cannot see the relevancy of it.

Mr. Hermann: It would relate to what was customarily done.

The Court: That would not be proper redirect because that subject wasn't one asked on direct. Objection sustained.

Q. (By Mr. Hermann): Mrs. Ipalook, do you know of your own knowledge whether or not Charlie Norton owned any other home in Kotzebue? Whether he had any other home in Kotzebue other than the Grill building?

A. He has a mother-in-law up there.

Q. Did he ever stay with his mother-in-law during the time he was employed at the Grill to your knowledge? A. No.

Q. Do you know whether or not any of Mr. Salinas' things were in his room during the month of December?

A. I noticed his personal belongings were still in the room.

Q. What kind? [192]

(Testimony of Esther Ipalook.)

A. Clothes. I would see clothes hanging in the closet, and his shoes.

Q. Do you know to your own knowledge where Mr. Salinas' laundry was done?

A. Upstairs in the Grill.

Q. I mean his personal laundry. Was that done upstairs? A. Yes.

Q. No further questions.

Recross Examination

Q. (By Mr. Crane): You spoke of Charlie Norton. Isn't it a matter of fact, Esther, that Charlie Norton quite frequently, a good part of the time, stayed over at Stubby Lambert's.

A. He used to go up there. I heard he used to go up there and visit some evenings.

Q. Now you spoke of—they have asked you about Steve Salinas' clothes being in his room. Isn't it a fact that he kept his cooking clothes and clothing and stuff that he used in the restaurant upstairs in that room. If he would come down from Rotman's and go up there and change clothes he would change into the clothes he would use around the restaurant. Isn't that the situation?

A. Well, I have never seen him changing clothes.

Q. Well, naturally. But what I am getting at, Salinas lived over at Rotman's and what he kept upstairs in his closet particularly, was clothes he used around the restaurant, wasn't it?

A. I guess so.

The Court: I think on the ruling on the objec-

(Testimony of Esther Ipalook.)

tion to the [193] question as to whether this witness thought the property was abandoned I think I said it was a matter of law. I mean to correct that. I think that is calling for a conclusion of the witness but I think in the final analysis it is going to be a question of fact. That is the way it looks to me.

Mr. Crane: Then may I be permitted to inquire of the witness——

The Court: No. It calls for a conclusion of the witness. My correction is, that it calls for a conclusion of the witness but it is not strictly a matter of law.

Mr. Crane: What I was getting at, my theory was there, I asked her if she knew of her own knowledge that the place had been abandoned as of a certain date.

The Court: But my ruling is that you may show facts but not her conclusions. That surely is a conclusion of the witness.

We will take a recess now until two o'clock.

(Thereupon the court duly admonished the jury and the regular noon recess was taken.)

After Recess

(At 2:00 p.m. court resumed session and the trial of the cause was resumed. Both counsel stipulated as to the presence of the jury and all others necessary were again present. The witness Esther Ipalook resumed the stand for further recross examination.) [194]

Q. (By Mr. Crane): Mrs. Ipalook, I have one more question I wish to ask you. I will ask you if

(Testimony of Esther Ipalook.)

it wasn't generally known by the help in the restaurant and by yourself that Steve Salinas was planning to go on a vacation in the latter part of December, 1957? A. Yes.

(There were no further questions and the witness was excused from the stand.)

ARCHIE ADIRIM

was then called as the next witness for the plaintiff, and after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Crane): Mr. Adirim, would you please tell the Court and jury your full name and occupation?

A. Archie Adirim, Deputy United States Marshal, stationed at Kotzebue, Alaska.

Q. How long have you had that capacity at Kotzebue? A. Approximately fifteen months.

Q. Were you stationed there in December of 1957? A. Yes.

Q. Do you recall where you were on the night of December 25, 1957? A. Yes, sir.

Q. Where were you that evening?

A. The first part of the evening I was at home, until late in the evening.

Q. What time did you leave home? [195]

A. It was approximately 11:50 or 11:55.

Q. Was there any particular reason you left at that time?

A. Yes. Thomas Richards came to the house and

(Testimony of Archie Adirim.)

told me there was a fire at the Kotzebue Grill and that someone had told him they had found some Blazo at the scene.

Mr. Crane: I object to what somebody else told him that was found at the scene of the crime as hearsay.

The Court: He may explain his conduct or reason for going to the fire, but the remark is probably hearsay. As to what somebody told you they found at the scene, that may be stricken, and the jury instructed to disregard it.

Q. (By Mr. Hermann): Had you had any previous indication there was a fire?

A. Well, I heard the church bell go at approximately 11:30 but I didn't know at that time there was a fire. I thought it was for midnight Mass at the Catholic Church, the best I can recall.

Q. What did you do when you left your house to go to the fire? What did you do then?

A. I walked to the fire and went into the Grill, into the kitchen of the Grill, and saw Charlie Wilson and asked him where the fire was supposed to be, and he said it was upstairs, and I went upstairs and I could see no indication of fire whatever at that time. It was out. However, someone was still up in the attic throwing water.

Q. What did you do then.

A. Well at that time there was somebody going through the hallway [196] ceiling entrance and I gave them my big light and helped push him up through the entrance.

(Testimony of Archie Adirim.)

Q. Do you know who it was?

A. I am not sure who it was; I believe it was Robert Lee, but I am not sure.

Q. Was Mr. Salinas at the fire at all?

A. I didn't see him then, but after that.

Q. About what time did you see him?

A. Approximately ten or fifteen minutes after I was there, after I got there.

Q. Was there any conversation that took place between you and Mr. Salinas?

A. He told me someone didn't like him.

Q. Did he say anything further?

A. No. Not at that time.

Q. How long did you remain in the building on that occasion?

A. Oh, approximately 20 to 25 minutes.

Q. Did you see Mr. Salinas at any time after that, when you saw him in the building there?

A. I believe I saw him downstairs.

Q. Was there any conversation that took place at that time? A. No. Not at that time.

Q. When did you next see him?

A. I believe it was the next morning he came to the house, came to the marshal's office. [197]

Q. Your house? A. Yes sir.

Q. What took place while he was at your house?

A. Well he told me from the information how the fire situation looked, that probably a small man had started the fire.

Q. Did he say anything further?

A. No sir. Not on the subject of the fire.

(Testimony of Archie Adirim.)

Q. How long did he remain at your house at that time?

A. I would say approximately ten minutes.

Q. When did you next see him?

A. That evening.

Q. Where at? A. At the Kotzebue Grill.

Q. What took place on that occasion?

A. I went to the Grill—a boy came to my place, Bernard Sheldon, and told me Mr. Salinas would like to see me at the Grill. So I went to the Grill and Mr. Salinas was there in the kitchen part of the Grill, and he told me he wanted to see me upstairs. So I went upstairs with Mr. Salinas and he asked me what I was going to do about the fire, and I told him I was going around getting statements and then he asked me if I had called the fire marshal and I told him I had called the fire marshal, and then he said that I went over his head by calling the fire marshal.

Q. Did he say anything further?

A. He said it was his building and I shouldn't have gone over his head to call the fire marshal, and besides he wanted to wire the building before [198] the fire marshal got there.

Q. Was anything else said at that time?

A. We had a discussion—I believe something else was said but I don't recall what it was.

Q. When did you see him again, if you did?

A. I left about that time, and he came out to the house, followed me up to the house, to the office.

(Testimony of Archie Adirim.)

Q. He followed you at the same time?

A. Yes.

Q. What took place at the house?

A. He told me that I never cooperated with him, and I told him my boss was Mr. Oliver at Nome, R. W. Oliver, the Marshal at Nome, and if he had any objections to my work or anything to say about it, to tell the Marshal, Mr. Oliver. He told me he didn't want to do that and I told him I wanted him to because I wanted to get it squared away.

Q. When did you next see him, if you did?

A. I don't think I saw him after that.

Q. Now aside from the time of the fire, were you ever in the building after the fire?

A. Yes sir.

Q. When was that?

A. I believe it was the evening of the 27th, the early afternoon of the 27th of December.

Q. Were you alone or were there others? [199]

A. No. There was a Mr. Mullaly was with me from the Kotzebue Electric Association, and also two others, two OSI. They had nothing to do with the investigation; they had heard about the fire and wanted to see the damage to the building.

Q. Was anyone else present?

A. Joseph Brantley.

Q. How did you get in the building?

A. Mr. Brantley let us in.

Q. Did he raise any objection whatever to letting you in the building?

A. No, he didn't.

(Testimony of Archie Adirim.)

Q. What did you do after you went in the building with Mr. Brantley?

A. We went to the back room and I went to the attic.

Q. What did you do in the attic?

A. I was looking for evidence.

Q. Did you remove anything from the attic?

A. Yes, I did.

Q. What did you remove?

A. I removed the casing of a soldering iron and two round hoops and an oval shaped hoop and an oval shaped disc.

Q. Would you tell us exactly where you removed those items from?

Mr. Crane: If your Honor please, at this time I am going to make a demand on the Government that they produce these items. This is the second or third witness that has testified about them.

The Court: They may produce them in due course. Naturally he must lay a foundation as to where the articles came from and [200] when before they can be offered in evidence.

Mr. Taylor: I believe they should be marked for identification first.

The Court: No. You may proceed.

Q. (By Mr. Hermann): Where did you take them? Where did you take these items from, exactly where?

A. I took them from the attic, just to the west of the attic entrance, on the west side between the joists.

(Testimony of Archie Adirim.)

Q. To which attic entrance do you refer?

A. The attic entrance in the back room.

Mr. Hermann: I would like to have these labeled for identification.

(Two hoops are marked for identification as plaintiff's Exhibit B.)

Q. Mr. Adirim, I hand you plaintiff's Exhibit B for identification and ask you if you recognize this object? A. Yes sir.

Q. What is that object?

A. Two round hoops that I found up there.

Q. Would you speak a little louder, please.

A. Two round hoops that I found at the scene of the fire in the Kotzebue Grill.

Q. Is there any way you can tell that those are the same hoops?

A. Yes. I have them marked there. [201]

Q. That tag, is that in your handwriting?

A. Yes, it is.

Mr. Hermann: At this time I would like to offer Exhibit B in evidence.

Mr. Crane: No objection.

The Court: It may be received.

(Plaintiff's Exhibit B is received in evidence.)

Mr. Hermann: I would like to have these labeled for identification.

(A hoop is marked for identification as plaintiff's Exhibit C; an oval metal disc is labeled for identification as plaintiff's Exhibit D.)

Q. Mr. Adirim, I hand you plaintiff's Exhibit C

(Testimony of Archie Adirim.)

for identification and ask you if you recognize it.

A. Yes sir.

Q. What is that?

A. That's the oval hoop that I removed from the scene of the fire at the Kotzebue Grill.

Q. And I hand you plaintiff's Exhibit D for identification and ask you if you recognize that?

A. Yes sir.

Q. What is it?

A. It's an oval shaped object I took from the fire scene. [202]

Mr. Hermann: At this time I would like to introduce both Exhibits C and D in evidence.

Mr. Crane: No objection.

The Court: They may be received.

(Plaintiff's Exhibits C and D are received in evidence.)

Mr. Taylor: If your Honor please, we are admitting them in evidence with the assumption they will eventually be connected with the *res gestae* of the crime.

The Court: Very well. You mean the Court is admitting them in evidence—you mean you do not object to them being admitted.

Mr. Taylor: Yes.

Mr. Hermann: I would like to have this item marked for identification.

(The casing of a soldering iron is marked for identification as plaintiff's Exhibit E.)

Q. (By Mr. Hermann): Mr. Adirim, I hand you plaintiff's Exhibit E for identification and ask

(Testimony of Archie Adirim.)

you if you recognize that item. A. Yes sir.

Q. What is it?

A. It is a soldering iron casing that I found at the scene of the fire at the Kotzebue Grill.

Q. Whereabouts at the scene of the fire was it found? [203]

A. Between the joists, just on the west side of the entrance.

Q. I see.

Mr. Hermann: I would like to offer this as plaintiff's Exhibit E.

Mr. Taylor: We would like to take a look at it first.

Mr. Hermann: Certainly.

Mr. Taylor: No objection.

The Court: The exhibit may be received.

(Plaintiff's Exhibit E is received in evidence.)

Mr. Hermann: I would like to have this item marked for identification purposes.

(A drawing of a floor plan is marked for identification as plaintiff's Exhibit F.)

Q. (By Mr. Hermann): Mr. Adirim, I hand you plaintiff's Exhibit F for identification and ask you if you recognize it. A. Yes sir.

Q. What is it?

A. It is a drawing that I made of the upstairs floor, if the attic had been removed, of the Kotzebue Grill.

Q. Can you state whether or not that is made to scale?

(Testimony of Archie Adirim.)

A. Well, it's made to scale, but not right down to the last inch because I didn't have the right equipment. [204]

Q. When did you make that?

A. That was made on the ninth of January, 1957.

Q. Did you make any actual measurements on the premises when you made that?

A. Yes. There was some actual measurements.

Q. Where did you measure from?

A. From these light fixtures in the back room.

Q. Where were the room arrangements measured from? A. From the outside.

Q. From the hallway?

A. The rear room was measured on the inside.

Q. Would you explain what the circles are?

A. They represent the light fixtures in the rear room.

Q. What does the more or less square represent?

A. That represents the attic entrance, into the attic.

Mr. Hermann: We would like to offer this in evidence as plaintiff's Exhibit E.

Mr. Taylor: We object, your Honor, on the grounds there is some writing upon them that is not borne out by the evidence, and also an attempt to get some evidence in that is contrary to the statements of the Government's other witnesses. If I may approach the bench.

(The following proceedings were at the bench

(Testimony of Archie Adirim.)

out of hearing of the jury:)

Mr. Taylor: We object to the labeling of the two rooms as bedrooms, but we have no objection to changing it to show just rooms. [205]

The Court: There was evidence of two witnesses they were bedrooms. There has been evidence of bedrooms. We must go by the evidence, not what you would like to have in evidence. There is ample evidence they were bedrooms.

(The following proceedings were within hearing of the jury:)

The Court: Objection overruled. The Exhibit may be received.

(Plaintiff's exhibit F is received in evidence.)

Q. (By Mr. Hermann): Mr. Adirim, I would like you to put an X in the area where you removed the items last identified, including the soldering iron casing and the hoops.

(The witness marks the Exhibit.)

Q. Would you put a larger X there that can be easily seen.

(The witness marks the Exhibit.)

Mr. Hermann: I would like to present the drawing to the jury.

The Court: Very well. It is understood, of course, that drawings of this nature are purely for illustrative purposes. They have no evidentiary value, but they are just to illustrate the witness' testimony.

Mr. Taylor: That's right, your Honor.

(The jury views the Exhibit.)

(Testimony of Archie Adirim.)

Mr. Hermann: I would like to have these photographs, there are seven of them, marked for identification.

The Court: They may be marked as a group and then you can [206] number each one in the group.

Mr. Crane: Those are the Pilcher photographs, are they?

Mr. Hermann: Yes.

(The photographs are handed to Mr. Crane.)

Mr. Crane: I think I agreed with Mr. Hermann that these should be introduced in evidence.

The Court: These are the ones you mentioned yesterday?

Mr. Crane: Yes. I presume they are. Are they not, Mr. Hermann?

Mr. Hermann: Yes.

The Court: It may be stipulated then, that the photographs which the District Attorney has just asked to be marked for identification, may be received.

(A series of photographs are marked for identification as plaintiff's Exhibit G-1, G-2, G-3, G-4, G-5, G-6, G-7.)

Mr. Crane: Yes, your Honor, that's quite right.

Mr. Hermann: Yes, your Honor. These are actually duplicates of them.

Mr. Crane: There are two photographs here, your Honor, that I would have to request that they be shown who put them there and how these items got there. They are not the ones I saw. These items were taken from the negatives of someone else.

(Testimony of Archie Adirim.)

Mr. Hermann: I object to counsel's remark. If he wants to object—— [207]

The Court: In other words, you withdraw the stipulation?

Mr. Crane: As to these two only.

The Court: Very well. They may be properly identified. What are those two numbers?

Mr. Hermann: Those two are five and six.

Mr. Taylor: Five and six, the reason we are objecting is that they are arranged exhibits.

Mr. Hermann: I object to counsel's remark.

Mr. Crane: We are not stipulating to it. We wanted——

Mr. Hermann: His remark is completely uncalled for.

Mr. Taylor: I think it's uncalled for to try and slip them in here.

The Court: Let us not harangue here. After all this is an orderly court. The stipulation is withdrawn as to these two exhibits, and they may be properly identified.

Mr. Hermann: I would like to move to strike counsel's remarks.

The Court: The remarks may be stricken.

(Plaintiff's Identifications G-1, G-2, G-3, G-4, and G-7, are received in evidence.)

Q. (By Mr. Hermann): Mr. Adirim, I hand you plaintiff's Exhibit G and ask you to examine them please.

Q. Do you recognize the photographs?

A. Yes, I do. [208]

(Testimony of Archie Adirim.)

Q. What are they pictures of?

A. These are pictures taken from the fire scene at the Kotzebue Grill.

Q. In your opinion do those photographs represent the scene as you saw it? A. Yes sir.

Q. On what date?

A. On the 30th when the pictures were taken, and also the first time I went there.

Q. The 30th of what? A. December, 1957.

The Court: Who took them?

A. Harold Pilcher.

The Court: In your presence?

A. Yes sir. I was there when he took the pictures.

The Court: Are you offering these two at this time? The only ones that are received in evidence then are this group, with the exception of these two, 5 and 6.

Q. (By Mr. Hermann): Mr. Adirim, were you ever in that building again after the 27th?

A. Yes sir.

Q. When was that?

A. That was on the 30th of December, 1957.

Q. Who was present on that occasion?

A. Mr. Oliver, Marshal Oliver, and Edward Harkabus. Mr. Harkabus is a special investigator for the—— [209]

Mr. Crane: We object to the remark as to who Mr. Harkabus is. Let him call the witness.

The Court: Objection overruled. He may state who he is, if he knows.

(Testimony of Archie Adirim.)

Q. (By Mr. Hermann): Continue.

A. Mr. Harkabus is a special investigator of the National Board of Underwriters and Insurance.

Q. How did you gain entrance to the building at that time?

A. Mr. Brantley admitted us.

Q. Did you remove anything from the building at that time? A. Yes, sir.

Q. What did you remove?

A. We removed a soldering iron element and a piece of paper and a cord and a piece of wire that had two other small pieces hanging onto the ends, other small pieces of wire, copper wire.

Q. Was anything else removed at that time?

A. Yes. We removed some sawdust from the attic.

Mr. Hermann: I would like to have this labeled for identification.

(An electric cord is marked for identification as plaintiff's Exhibit H.)

Q. (By Mr. Hermann): Mr. Adirim, I hand you plaintiff's Exhibit H for identification and ask you to examine it and tell us whether it is familiar to you? A. Yes sir. [210]

Q. What is it?

A. I believe it to be the cord of a soldering iron.

Mr. Crane: If your Honor please, I ask that the answer be stricken, what he believes it to be. He can answer whether it is a cord or not. It calls for an opinion as to what he believes it to be a cord of.

(Testimony of Archie Adirim.)

The Court: Why can't he state what he believes it to be, unless it is a matter of expert knowledge. Objection overruled.

Q. (By Mr. Hermann): Where does that come from, Mr. Adirim?

A. It came from the Kotzebue Grill.

Q. Whereabouts?

A. It was in the back room of the Grill and frozen to the bottom of a box.

Q. By back room, what floor of the Grill?

A. That was on the second floor.

Q. I see.

Mr. Hermann: I would like to move the Exhibit be accepted in evidence as plaintiff's Exhibit H.

Mr. Crane: We object, your Honor, upon the grounds that it wasn't shown it was ever in the attic or had anything to do with the fire. They haven't shown what type of cord it is and it is incompetent, irrelevant and immaterial at the present time. It might be a cord to an electric toaster.

The Court: It might be. It is competent evidence and may be received. [210]

(Plaintiff's Exhibit H is received in evidence.)

Mr. Hermann: I would like to have this item labeled for identification purposes.

(A soldering iron element is marked for identification as plaintiff's Exhibit I.)

Q. (By Mr. Hermann): Mr. Adirim, I hand you plaintiff's Exhibit I for identification and ask you if you recognize it? A. Yes, I do.

(Testimony of Archie Adirim.)

Q. And what is it?

A. It is an element to a soldering iron, the heating element.

Q. How do you know it is an element?

A. Well I have seen other soldering irons that have similar elements.

Q. Where did that come from?

A. It was laying on a bed against the south wall in the upstairs back room.

Q. Where was that bed in relation to the attic entrance of the back upstairs room?

A. The attic entrance would be to the north. May I see that sketch?

The Court: Yes.

Q. (By Mr. Hermann): I hand you plaintiff's Exhibit F and ask you if you can explain where the element was? [211]

A. Yes. There was a bed right in about here (indicating).

Q. Would you write the word element where you found that and put your initials after it.

(The witness marks the Exhibit.)

Q. (By Mr. Hermann): Would you attach that tag to the object, you have returned to me.

(The witness does as requested.)

Q. (By Mr. Hermann): What is that tag, Mr. Adirim?

A. My identification tag that I made out.

Q. When did you attach it?

A. December 30, 1957.

Mr. Hermann: I would like to move that this be accepted as plaintiff's Exhibit I.

(Testimony of Archie Adirim.)

Mr. Taylor: I would like to take a look at it, please.

Mr. Hermann: Certainly.

Mr. Taylor: If your Honor please, we are going to object to the admission of this upon the grounds it is not connected up with the alleged offense and not connected up with any other part of a soldering iron. It was found several days later laying on a bed in second floor. It doesn't show connection in any way whatever.

The Court: This Court does not pass upon the sufficiency of the evidence. That is for the jury. What you are arguing about is how good it is. It is proper evidence and may be received. It is for the jury to decide how valuable it is, not me. I would wish [212] he would explain though, if he can, in his knowledge, what is the relationship between Exhibit E and Exhibit I.

(Plaintiff's Exhibit I is received in evidence.)

The Court: Would you get the other Exhibit, E, please. If there is any connection between the two I think it should be explained.

Q. (By Mr. Hermann): Mr. Adirim, would you explain, if you are able to do so, any connection between Exhibit E and Exhibit I.

A. Yes. The element fits into the iron.

Q. I see. Where was Exhibit I found?

A. It was found on the bed against the south wall. In the upstairs back room.

Q. Where was Exhibit E found?

A. This was found in the attic.

(Testimony of Archie Adirim.)

Q. How far was Exhibit E found from where Exhibit I was found, in feet, if you know?

A. I don't know exactly, but I would say about seven or eight feet.

Mr. Hermann: Has Exhibit I been received in evidence?

The Court: Yes.

Mr. Hermann: I would like to have this jar marked for identification.

(A jar containing a piece of paper is marked for identification as plaintiff's Exhibit J.) [213]

Mr. Taylor: If your Honor please, we are going to object to the introduction of those as evidence unless properly connected up as to having some connection with the crime or connection with this defendant—a paper towel in a jar——

Mr. Hermann: We haven't moved to have them admitted in evidence as yet.

Mr. Taylor: I will move against them anyway. We don't know whether they are in the same condition as when found there, whether they were found in the jar or not. There is no identification as to their original state when found.

The Court: I rather think your objection is premature, counsel. We will wait to see if it can be identified.

Q. (By Mr. Hermann): Mr. Adirim, I hand you plaintiff's Exhibit J for identification and ask you if you recognize it? A. Yes, I do.

Q. What is it?

A. It is a piece of paper that was found in the

(Testimony of Archie Adirim.)

attic at the scene of the fire in the Kotzebue Grill.

Q. Would you state whether or not it was found in the jar at the time?

A. No sir. It was not found in the jar.

Q. When was it placed in the jar?

A. It was placed there on the 30th, December 30, 1957.

Q. Who placed it in the jar?

A. I did. [214]

Q. Now exactly where was that found in the attic? The paper?

A. It was found to the north of where I found the hoops and soldering iron case.

Q. How far to the north?

A. Approximately two and a half feet.

Q. Would you state whether or not you had seen any other paper of that nature at the Kotzebue Grill.

A. I did.

Q. Where at? A. In the bathroom.

Q. What kind? A. Rolls.

Q. What kind of rolls?

A. Toweling, I believe it was.

Q. Do you recognize the tag on that jar?

A. Yes, I do.

Q. Where has that exhibit been since you found it?

A. It has been in the office of the marshal here in Nome, in the evidence locker.

Q. I see. Would you remove it from the jar, please, the paper.

The Court: Counsel, perhaps you had best offer it before proceeding further.

(Testimony of Archie Adirim.)

Mr. Hermann: I would like to offer Plaintiff's Exhibit J for identification into evidence.

Mr. Taylor: I would object, your Honor, upon the grounds set forth. This was secured several days afterwards. A lot of men were [215] working around there, cleaning up, and it could just as well have been put up there after the fire as before. In fact I think common sense would tell us it was.

The Court: Counsel, your argument is for the jury. I do not pass on the weight of the evidence. You are arguing to the jury that it is not very good evidence and that is not proper. What is the legal objection to its introduction?

Mr. Taylor: It is incompetent, irrelevant and immaterial and not connected up with the crime, your Honor.

The Court: Objection overruled. It may be received.

(Plaintiff's Exhibit J is received in evidence.)

Q. (By Mr. Hermann): Would you remove the paper towel from the jar, please.

(The witness does so.)

Q. Would you examine it. Now, would you tell us how you can tell that is the same towel that you recovered from the attic?

A. It has here a stain (indicating), some kind of a stain. It looks like a pinkish stain. And it also has these marks here, soot and cinders there (indicating) on the towel.

Q. Would you state whether or not you have

(Testimony of Archie Adirim.)

ever seen anything similar to that tannish stain at the Kotzebue Grill?

A. Yes. I believe I have.

Q. Where?

A. In the room of Mr. Salinas. [216]

Q. What was it?

A. Some tan pancake makeup.

Q. Would you replace it in the jar, please.

(The witness does so.)

Mr. Hermann: I would like to have this quart jar labeled for identification purposes.

(A jar containing sawdust is marked for identification as plaintiff's Exhibit K.)

Q. (By Mr. Hermann): Mr. Adirim, I hand you plaintiff's K for identification and ask you if you can identify it. A. Yes, sir.

Q. What does that jar contain?

A. It contains sawdust taken from the fire area that contains a similar smell of gasoline.

Mr. Crane: I ask that the last part of the answer be stricken. There is no evidence of any gasoline in here yet of this witness.

The Court: What did you mean, Mr. Adirim, by a similar smell?

A. Well, either gasoline or blazo.

The Court: What you meant is a smell similar to gasoline?

A. Yes.

The Court: Objection overruled.

Q. (By Mr. Hermann): Where did that sawdust come from? [217]

(Testimony of Archie Adirim.)

A. It came from an area of three to five inches just right where I found the soldering iron casing. The general area where the hoops were found.

Q. How far in relation to the door of the attic, the trap door?

A. Right to the west, and just in between the two joists, right next to the plugin there, the light socket.

Q. Who was present when that sawdust was removed?

A. Myself, Marshal Oliver, Mr. Harkabus, and Abraham Kowunna.

Q. What kind of condition was that sawdust in? Describe it at the time you found it.

A. The sawdust up there—digging around in the sawdust—the sawdust was frozen. We dug through and we got this odor, and we put the sawdust in a can that was cleaned out—the can was cleaned out—and we took it to the office. My wife got this jar and washed and dried the jar thoroughly, and we put the sawdust in here.

Q. Where has that jar been since then?

A. It has been in the evidence locker here of the United States Marshal at Nome.

Q. Do you know of your own knowledge whether or not that jar has ever been opened since that time?

A. It was opened once I believe.

Q. When was that?

A. That was approximately a month ago, I believe, when I was down here.

(Testimony of Archie Adirim.)

Q. Was anything removed or added to it at that time? A. No sir. [218]

Mr. Hermann: I would like to offer plaintiff's Exhibit K for identification.

Mr. Taylor: Let's take a look at it.

The Court: Any objection?

Mr. Taylor: No objection.

The Court: It may be received.

Mr. Hermann: I would like permission to open the jar and pass it to the jury after it has been labeled.

(Plaintiff's Exhibit K is received in evidence.)

(The Exhibit is passed to the jury.)

Mr. Hermann: I would ask the jury to smell it.

(The Exhibit is then handed to the witness.)

Q. (By Mr. Hermann): Mr. Adirim, I hand you plaintiff's Exhibit K and ask you to smell it and tell me whether or not it smells the same as it did at the time it was taken?

A. It smells the same, or it was stronger at that time.

Q. As to the quality, is it the same type of smell? A. Yes sir.

Mr. Hermann: I would like to have this labeled for identification purposes.

(A piece of cable is marked for identification as plaintiff's Exhibit L.) [219]

Q. (By Mr. Hermann): Mr. Adirim, I hand you plaintiff's Exhibit L for identification and ask you if you can identify it? A. Yes sir.

(Testimony of Archie Adirim.)

Q. What is it?

A. It is a piece of BX cable.

Q. And where was that taken from?

A. It was taken from the attic of the Kotzebue Grill off of a switch line.

Q. How far from the trap door to the attic was that?

A. It wasn't very far. Just the exact distance I cannot remember how far. It wasn't too far.

Q. Have you examined the tag on that?

A. Yes sir, I have.

Q. Whose writing is that? A. My writing.

Q. When did you put the tag on?

A. January 2.

Q. When was it taken from the attic?

A. January 2.

Q. January 2? A. Yes sir.

The Court: Can you tell us what it is.

A. I believe it is what they call BX wire.

Mr. Hermann: I would like to offer this. [220]

Mr. Crane: I would like to see that Exhibit if I may, Mr. Hermann.

(Mr. Crane examines the exhibit.)

The Court: Do you mean wire or cable?

A. I believe cable is what they call it.

Mr. Taylor: No objection.

The Court: It may be received.

(Plaintiff's Exhibit L is received in evidence.)

Mr. Hermann: I would like to have this small wire marked for identification.

(Testimony of Archie Adirim.)

Mr. Crane: (To witness) You identified that as BX?

A. I think we got some BX, BX containing wire, BX cable containing wire. I am not sure if that's what they call it.

The Court: That's what you believe it to be?

A. That is what I believe it to be, but I am not sure.

(Two small pieces of copper colored wire are marked for identification as plaintiff's Exhibit M.)

Q. (By Mr. Hermann): Mr. Adirim, I hand you plaintiff's Exhibit M for identification and ask you if you recognize it? A. Yes sir.

Q. Will you describe it please.

A. A piece of copper wire — a small piece of copper wire. A short piece [221] of copper wire and a longer piece of copper wire, both ends hooked over, and the shorter piece one end, I believe one end has been broken off of it. However, this is the way it was found.

The Court: You mean that's the way it appears?

A. Yes, it appears that way.

Q. (By Mr. Hermann): Would you state exactly where that was found?

A. This long one was found on the end of this (indicating). The wire protruded, or one wire protruded from what we called the BX cable, protruding through that.

Q. Mr. Adirim, I hand you the BX cable, plaintiff's Exhibit L, and ask you to show us how Ex-

(Testimony of Archie Adirim.)

hibits L and M were at the time you found them.

Mr. Crane: Pardon me. May I step around there?

The Court: Yes.

A. As far as I can recall—I am not sure which side of the wire this was on. It was hanging on one side of the wire similar to that (demonstrating), and this piece (indicating) was on the other wire laying below it on the sawdust, this small piece.

Q. (By Mr. Hermann): Whereabouts in the attic was that?

A. Right close to the edge of the trapdoor.

Q. Would you remove plaintiff's M for identification, please.

(The witness does so.)

Mr. Crane: We have no objection to them.

The Court: The exhibit may be received. [222]

(Plaintiff's Exhibit M is received in evidence.)

Mr. Hermann: I would like to move that Exhibit M be received.

The Court: I had already stated that it may be received. It would be quite in order to take a recess at this time. We might make it twelve minutes and reconvene at 3:15 if you will agree to be prompt.

(Thereupon at 3:03 court recessed for approximately twelve minutes.)

(Testimony of Archie Adirim.)

After Recess

(At 3:15 Court reconvened, both counsel stipulated as to the presence of the jury, and all other necessary persons being again present the trial of the cause was resumed. Mr. Adirim resumed the stand for further direct examination.)

Q. (By Mr. Hermann): Mr. Adirim, how much time did you spend in the attic on the 27th?

A. Approximately an hour.

Q. How much on the 30th?

A. Well three or four hours, I would say.

Q. Will you state whether or not you examined the structure of the building? A. I did.

Q. What did you examine it for? [223]

A. I examined it for the place with the deepest char on the building joists, trying to find the center of the fire.

Q. Where did you find the deepest char, if you did?

A. Just on the joist—if I could see these pictures I think I could explain it better, if I could.

Q. I hand you plaintiff's Exhibit G, with the exception of 5 and 6, and ask you if you can show us on any of those pictures where the deepest char was in the building?

A. Right here where my finger is pointing.

Q. What is the number of that picture, Mr. Adirim?

A. I believe it is seven. That's the number on the back.

(Testimony of Archie Adirim.)

Q. Now would you explain from that picture where the deepest area of char is.

A. Right here where my finger is pointing.

Q. Is that finger in the picture on your hand?

A. Yes. That is where it was deepest. We dug down through the sawdust and that is where the deepest char was.

Q. Where was the hoops and soldering iron casing and the waste basket parts found?

A. Right in here (indicating), approximately right in there.

Mr. Taylor: Your Honor, I am going to object to the District Attorney referring to the hoops of a waste basket. I don't know that there is anything in evidence of any waste basket.

The Court: Not with this witness, that is true. Objection will be sustained. [224]

Mr. Taylor: We move it be stricken.

The Court: It may be stricken. I think too, counsel, these pictures, the photographs which were admitted by stipulation, but they have never been explained. I think it would be helpful to have this witness, if he can, explain what they are, or some witness; this whole group with the exception of the two that you had kept out.

Q. (By Mr. Hermann): Mr. Adirim, were you present when those pictures were taken?

A. Yes, I was.

Q. When were they taken?

A. December 30, 1957.

Q. Who took them?

(Testimony of Archie Adirim.)

A. Mr. Pilcher, Harold Pilcher.

Q. Did you see him take each and every one of those? A. Yes sir.

The Court: It wasn't a matter of identification. That is not necessary where they are admitted by stipulation that that matter be explained, but what are they?

A. They are pictures — shall I give them by number?

Q. (By Mr. Hermann): By number if you wish.

A. This picture marked No. 7, is taken up in the attic, showing the entrance to the attic and part of the deepest char.

Q. I see. What is the next picture?

A. This picture is the shot taken showing the switch line and the cord [225] and the upper part in the attic, shooting back toward the east wall, the end wall of the attic.

Mr. Crane: That is number what?

A. Number 4, I believe, Mr. Crane. This picture, No. 3, is shot up towards the roof, showing the damage on the roof. This picture, picture No. 2, was taken shooting toward the west of the building from the back wall, showing the position of the cable, the BX, and the other line that runs in there, and also showing some of the char damage to the building, also taken in the attic. This picture, picture No. 1, was taken in the rear room and shows the trap door and the north wall of the room below the entrance, the ceiling entrance of the back room.

(Testimony of Archie Adirim.)

Mr. Hermann: At this time I would like to let the jury examine the photographs.

The Court: Very well.

(The photographs are given to the jury.)

The Court: Were those taken with flash equipment?

A. Yes sir.

Mr. Hermann: (To the Jury) Would you pass them on as you examine them, to save time.

The Court: I might state to the jury too, that photographs such as this, in the same manner as the plat, are admitted for purposes of illustration.

Mr. Hermann: No further questions.

Cross Examination

Q. (By Mr. Crane): Now how long after the alarm went in did you say you arrived at the scene of the fire? [226]

A. Well, I heard the bell at approximately 11:30. I would say twenty minutes to half an hour.

Q. How far is it from the Kotzebue Grill to the Marshal's office in Kotzebue, approximately?

A. Approximately a block or a block and a half.

Q. When you heard the bell ringing did you go out and look to see if there was any fire?

A. No sir, I did not.

Q. Which bell was ringing?

A. I believe it was the Catholic Church bell.

Q. Was it a pronounced ringing or was it an intermittent ringing?

A. No, it rang—it was a pronounced ringing.

(Testimony of Archie Adirim.)

Q. Don't you know that in Kotzebue the pronounced ringing of a church bell or school bell is what we use for a fire alarm?

A. That is the second fire we have had since I have been there. I have heard bells go at other times. I knew they used a bell.

Q. Does the Catholic Church have a mass on Christmas night?

A. I don't know; I couldn't say, Mr. Crane.

Q. Didn't you think it was unusual for a continuously ringing bell at that time of night?

A. No I didn't.

Q. You didn't make any effort to investigate as to what was going on?

Mr. Hermann: I object, your Honor. That's argumentative.

The Court: It is rather argumentative.

Mr. Crane: A fire is the duty of a United States Marshal up there. [227]

The Court: His duty as a matter of law?

Mr. Crane: Not as a matter of law, as a matter of fact in Kotzebue.

The Court: Not a matter of law. I cannot see any point in this inquiry whatever.

Mr. Crane: Very well.

Q. (By Mr. Crane): When you arrived at the fire, was the fire under control Mr. Adirim?

A. I believe it was out, Mr. Crane.

Q. The fire was out. Now—if your Honor will please pardon me if I walk in front here—I hand you plaintiff's Exhibit 1 and ask you what that is—Exhibit B?

(Testimony of Archie Adirim.)

A. They are hoops.

Q. I hand you plaintiff's Exhibit 2 (c) and ask you what that is? A. An oval hoop.

Q. Off of what? A. That I couldn't say.

Q. Could it be off a baby buggy?

A. I don't know.

Q. All you know is that it's an iron hoop?

A. Yes sir.

Q. You don't know. What you do know though, is that it has been through a fire?

A. Yes. It was at the scene and looks like it had been through a fire.

Q. And you don't know what it was on at the time it was charred like this? [228]

A. No sir, I don't.

Q. At just what part of the scene of the fire did you find these hoops? You may use the pictures to illustrate, if you wish. If I may have the pictures, please.

(The pictures are handed to Mr. Crane.)

I hand you plaintiff's Exhibit G. Just where did you find those hoops with reference to the entrance?

A. Approximately right here in this area—may I use my pencil?

Q. You may.

A. Right in about here (indicating).

Q. Were the hoops close enough to the entrance so they could be reached or did you have to go up in the attic?

A. I was up in the attic. I saw them when I was in the attic.

(Testimony of Archie Adirim.)

Q. You didn't observe them until you did go in the attic? A. That's right sir.

Q. How far from the entrance then, in the attic, would you judge the hoops to be when you found them?

A. I would say approximately seven inches, maybe a little more or less.

Q. Then they could have been reached from the entrance? A. I believe they could sir.

Q. I hand you plaintiff's Exhibit D which is a piece of metal and ask you if you know what that is? A. It is an oval shaped piece of metal.

Q. You don't know where it came from?

A. No sir, I don't. [229]

Q. Do you notice the rust on the bottom of it?

A. Yes sir.

Q. Does it look as if it had laid a long time either outdoors or in the water?

A. It could have—I would say the bottom part, sir.

Q. In other words it's not a piece of new material by any means? A. No sir.

Q. Now this cord, I believe you testified where we had it out, that you believed this was a cord to a soldering iron. I will ask you to examine that cord again. Could that be a cord to an electric iron?

A. It could be, yes.

Q. Are you familiar with the upstairs room where this fire occurred?

A. No sir, I am not. I wasn't at the time.

Q. Do you know whether or not there was ever anyone in there doing ironing?

(Testimony of Archie Adirim.)

A. I understand there was one girl used to iron there.

Q. That could very well be an iron cord, could it not? A. Yes.

Q. As a matter of fact it could be a cord to a percolator, couldn't it? A. Yes sir.

Q. Or the cord from a toaster? A. Yes.

Q. In other words, when you said it was connected with the soldering iron——

A. I didn't say it was connected to the soldering iron, Mr. Crane. [230] I don't believe I did.

Q. When you found it was it in the shape it is now? A. No sir.

Q. What shape was it in when you found it?

The Court: You may see the pictures.

Q. (By Mr. Crane): Surely you may see the pictures.

A. I think it was in one of those pictures that are not admissible, I believe. I will try and explain. I don't know whether I can explain just the exact shape.

Q. Where did you find that cord?

A. On the bottom of a canned goods box.

Q. Then you didn't find that cord at the scene of the fire?

A. In the downstairs room, yes sir.

Q. Not up in the attic necessarily?

A. It was in the downstairs room.

Q. The downstairs room? A. Yes sir.

Q. Then this cord—do I understand you picked this cord up downstairs in the restaurant?

(Testimony of Archie Adirim.)

A. No sir. No sir. On the upstairs floor in the back room.

Q. How far away from the fire area?

A. Probably, I would say six or seven feet, approximately that, approximately.

Q. Was it concealed in any way? [231]

A. There was a box on top of it, yes sir. There was one end hanging up over it. Just what end it was I forget.

Q. Can you see any evidence of fire on that cord?

A. I believe it is burned on this end, Mr. Crane.

Mr. Hermann: Will you speak a little louder, please.

A. I say, I believe it has been burned on this end.

Q. (By Mr. Crane): Could that be burned from use—doesn't that appear to be quite an old cord? I will put it this way: with reference to other articles burned in the building, the soldering iron, whatever you testified to, does that show any evidence of being burned?

A. No sir, the whole cord doesn't. The whole cord doesn't show evidence of being burned.

Q. Now defendant's Exhibit E, for identification, I will ask you where you found that?

A. May I use the pictures again?

Q. Yes, go ahead.

A. Right in just about here (indicating).

Q. Hold it up so the jury can see.

A. Approximately in this locality right here.

(Testimony of Archie Adirim.)

The Court: Well now, you should mark that somehow. Put an X on it.

(The witness marks the exhibit.)

Mr. Taylor: If your Honor please, I would suggest on illustrating with a small picture that way, it might be available to the witness [232] to step over in front of the jury.

A. I am marking No. 7.

The Court: Yes. You may step over and point it out to the jury.

(The witness does so and then resumes the stand.)

Q. (By Mr. Crane): Now again asking you about this soldering iron I would like to have you read to the jury the number, the make and anything, any identifying marks on that soldering iron, as to voltage and amperage and whatever it is.

A. Soldermaster, W 55 NO, following that then it says V 115, 55 B, Hexacon Electric Co., Roselle Park, N. J. Underneath the word Soldermaster, there is again the Hexacon Electric Co., Roselle Park, N. J.

Q. Then that is a 55 watt, 115 volt iron, is it not?
A. I believe it would be, yes.

Q. Now where did you find this piece of material with reference to the iron?

A. This what?

The Court: This piece of material, counsel?

Mr. Crane: I beg your Honor's pardon.

Q. (By Mr. Crane): Exhibit I, where did you find that with reference to the other exhibit, E, I believe.

(Testimony of Archie Adirim.)

A. In the downstairs room below, the room where the ceiling entrance is. May I look at these pictures again? By downstairs, I mean below the [233] upstairs back room.

The Court: You don't mean the ground floor?

A. No sir. The second story, just below the ceiling entrance.

Q. (By Mr. Crane): All right. Then you did not find the element of the iron at the place of the fire where you found the soldering iron?

A. No sir, not in the same location, no sir.

Q. Were they in the same building?

A. Yes sir.

Q. In the same room?

A. Well, the soldering iron was upstairs in the attic, that is, the casing.

Q. And the element was where?

A. Just below. In the room just below the ceiling entrance on the second floor.

Q. How do you know then, that those are pieces of the same instrument?

A. I don't know that they are pieces of the same instrument sir.

Q. Very well. Handing you plaintiff's Exhibit J. You say there is a brown stain on it. Isn't there also a pink stain or a red stain?

A. Yes. I think this stain right here, this stain right here (indicating).

Q. Couldn't that pinkish stain very well be from lipstick used up there in the room?

A. Yes, it could be.

(Testimony of Archie Adirim.)

Q. Where did you find that piece of material?

A. Back right in about here sir, in that general locality (indicating). [234]

The Court: Would you point that out to the jury please. You could step over there, if you will.

(The witness points out the place indicated to the jury and then returns to the stand.)

Q. Right there, your Honor.

The Court: Yes.

Q. (By Mr. Crane): You probably notice, Mr. Adirim, that my hands are quite soiled from using that exhibit, are they not?

A. I believe so, yes.

Q. Then wasn't that exhibit put in there after the fire?

A. That I couldn't say sir. I don't know.

Q. What is the purpose of this piece of toweling then?

A. I take it to show that it was found in the attic; but what it's purpose was I don't know.

Q. If it had been in there at the time of the fire why wasn't it burned up?

A. Well, if you will notice here, Mr. Crane (indicating), it does look like it is burned over here, how I wouldn't say—whether it was in there before the fire or after the fire.

Q. You are not inferring, by any chance, whether it was there before the fire or not, are you?

A. I don't know.

Q. Wasn't there many men up there that night during the fire? [235]

A. Yes.

(Testimony of Archie Adirim.)

Q. Several people working around there?

A. Yes sir.

Q. Towels in the bathroom?

A. Yes sir.

Q. Couldn't anybody have gone in there and got a piece of towel and wiped their hands as they were working around?

A. As far as I know sir.

Q. Could it have been somebody with you?

A. I don't believe so sir.

Q. Wouldn't it be quite likely for an electrician cutting the wire to use a paper toweling?

A. He probably could have, yes.

Q. Now we will come to these pieces of cable. I believe they are plaintiff's Exhibit L, which I believe has been identified as a piece of BX. I will ask you to examine these pieces of BX and examine particularly this end of it, and see if it isn't just as much burned on the inside as it is on the outside?

A. I can't see down in this too far, but what I can see it is just as much burned, yes sir.

Q. In other words, the wire could have shorted out and burned inside of the cable?

A. As far as I know it could have.

Q. Where did you find this piece of BX, if you will show the jury?

A. Now I am not too sure in my own mind where that was, Mr. Crane, [236] although it was somewhere near the trap door.

Q. Somewhere near the trap door?

(Testimony of Archie Adirim.)

A. Yes sir.

Q. Was it connected to anything?

A. This piece of cable was running back to the light switch, ran back to it.

Q. At the time you took it, was it connected to the light switch? A. I believe it was, yes.

Q. Then you disconnected it from the light switch when you took it out? Is that correct?

A. Had it sawed off right here, as I recall, yes.

Q. Where is the rest of the cable?

A. I imagine it is still in the building.

Q. In other words, you cut off the stapled end from the—extending from the light switch through the fire area—did you get all of the BX that was in the fire area?

A. I believe there is another piece.

Q. Do you have it here with you?

A. I believe it is here. I believe it is in the evidence locker sir.

Q. Can you produce it?

A. I believe I can, yes.

Q. If you can, Mr. Adirim, will you point out on the picture where the switch is located that this BX was tied on to.

A. I don't believe it's in the picture, Mr. Crane. No sir. It is on the outside wall as you enter this room, this upstairs backroom, just before you enter the room. [237]

Q. If you would show us, please, on the exhibit about where the switch would be so we can understand the hookup—

(Testimony of Archie Adirim.)

A. It is not in the picture at all, but as you come in the door leading to it, on the right-hand side, on the outside of the room.

Q. And that Exhibit 1 from Exhibit G, Exhibit G-1. That's what I wanted you to explain, Mr. Adirim. Now where you come into the building, is this light switch then concealed?

A. To the attic—yes, sir; I believe it comes up through the wall and over to the attic on the joist there (indicating).

Q. Do you know whether or not that is BX or did you examine it?

A. Yes. There is BX to the switch.

Q. Then the BX goes up into the attic—how far is it from where it enters the attic to the scene of the fire?

A. From where it enters the attic to the scene of the fire?

Q. Yes. To the area of the fire.

A. This is just an approximation——

Q. Yes, that is what I expect.

A. From where it comes out from the wall over to the fire area I would say about six feet, maybe a little more and maybe a little less, but somewhere in that neighborhood.

Q. Then there is probably four or five feet of wiring in the attic? Is that correct or, correct me if I am wrong. How many feet?

A. Well now I couldn't say how many feet.

Q. Well now, did you cut off all of the BX that was laying in the fire area?

(Testimony of Archie Adirim.)

A. I believe so. [238]

Q. Now I will ask you this: was this piece of BX laying in the area where the deepest char is shown?

A. Yes. Just where it was laying right over in here (indicating).

Q. You mean the deepest char was right here (indicating)?

A. No, I believe it was following right in around here.

Q. Part of the BX cable ran through the deepest char area, is that correct?

A. I believe so, Mr. Crane, but I wouldn't say for sure.

Q. Now, Mr. Adirim, just as a matter of common knowledge, a piece of toweling wouldn't ordinarily be black with soot and anything from the fire, if it had been used in an attic that there was no fire in, would it? A. I don't know.

Q. Well that soot could only get on there from the fire, couldn't it?

A. I don't know how it got on there, Mr. Crane.

Q. Now you say you smelled gasoline?

A. Yes sir.

Q. What does gasoline smell like?

A. Well, it is hard to explain the way it smells.

Q. What I mean, what I am getting at is this: isn't there a difference between the odor of plain gasoline, gasoline and blazo that comes from an exhaust pipe when it is being burned?

A. I don't know. I never—after being burned I never have noticed.

(Testimony of Archie Adirim.)

Q. Well you testified here that you smelled gasoline in the bottle.

A. Yes. But that wasn't coming from an exhaust pipe either.

Q. Where was it coming from?

A. That was coming from the sawdust after we dug it out. [239]

Q. Did I understand you to say this sawdust was frozen? A. Yes, it was.

Q. Does gasoline freeze?

A. I don't believe it does.

Q. Does fuel oil freeze?

A. I don't believe so, unless it has water in it.

Q. How could you tell this was frozen?

A. That came from the bottom. The top was frozen where the water was. From the bottom laying on the ceiling—plywood formed the ceiling—is where we got that. We had to dig through.

Q. Do you mean to tell me, Mr. Adirim, that you can smell any gasoline, fuel oil or petroleum-like odors from that thing?

A. Yes sir. I can smell a faint odor I believe.

Q. A faint odor of what?

A. Just what I don't know, but some kind of petroleum products.

Q. Doesn't it smell more like fuel oil than, did you say, gasoline?

A. I don't think so, Mr. Crane.

Q. As a matter of fact, Mr. Adirim, isn't the whole attic insulated with sawdust? A. Yes.

Q. Isn't it insulated with sawdust Ferguson hauled in on oil barges?

(Testimony of Archie Adirim.)

A. I don't know who hauled it in. I wasn't there then.

Q. Now what you smell there is burned petroleum? A. I couldn't swear to it, no sir.

Q. Well, what I am getting at, from what you are testifying to there, [240] petroleum was burned. Why do you say there is an odor of gasoline?

A. In my opinion——

Q. In other words, you are guessing it's gasoline.

A. Well, I believe I can smell it in there, Mr. Crane.

Q. You believe you can smell it? Do you believe at this time that you can smell gasoline in that jar?

A. I believe I can smell a faint odor of it, yes.

Mr. Crane: Has the jury smelled this yet?

The Court: The exhibit was passed around to the entire jury.

Mr. Crane: Very well.

Q. (By Mr. Crane): I asked you a minute ago if you had found another piece of BX cable in the fire area? A. Yes sir.

Mr. Crane: Have you any objection to him putting it in, Mr. Hermann?

Mr. Hermann: No. I think the deputy can get it for him.

The Court: Can you get it please, Mr. Levine? Can you proceed meanwhile with something else, counsel? It might take him a few minutes to find it. Can you go ahead with something else?

Mr. Crane: I wasn't going to finish with this witness until I got into that.

(Testimony of Archie Adirim.)

The Court: Very well.

Mr. Crane: While we are waiting for that, I might take up these two short wires. [241]

Q. (By Mr. Crane): Handing you plaintiff's Exhibit M, I will ask you first where you found these?

A. This long wire (indicating) was found connected to one of these wires. It was hanging—just what side it was hanging on, I really don't know. And this one was below it on the sawdust, this part here was hanging (indicating).

Q. Are these the same texture of wire, as far as you can tell?

A. I am not sure whether this one comes off there—I don't know.

Q. Now as I understand you, you say they were hanging like that (indicating)?

A. Yes sir. The BX wasn't vertical; it was laying across the joists.

Q. When you found them, the BX had burned off and this wire was connected like this (indicating)?

A. No sir. It wasn't connected to anything, just laying or hanging there.

Q. Do you mean hanging?

A. Yes. Just like that (indicating).

Q. When you found it in the attic, the piece of BX extended from the wall to the fire area and through the fire area, did it?

A. Yes sir, from the switch line.

Q. And this was hanging on it?

(Testimony of Archie Adirim.)

A. Yes sir.

Q. You couldn't tell then from your examination whether they had ever been connected?

A. No sir, I don't know.

Q. But it was still hanging there? [242]

And the other piece was a piece of loose wire?

A. Yes sir.

Q. Now they were laying flat, along like this (indicating)?

A. Yes. They were laying across the floor here, just about the way this piece of wire is laying.

Q. All right. Now where did you say this other piece of BX came into?

The Court: It has just been brought into court.

Mr. Crane: May I have it, please. If the plaintiff doesn't care to introduce it, I will ask that it be marked as defendant's exhibit for identification.

The Court: Yes. Very well.

(A piece of BX cable is marked for identification as defendant's Exhibit No. 9.)

Q. (By Mr. Crane): I hand you defendant's Exhibit No. 9 for identification and ask you first if you know what it is?

A. Yes sir. A piece from the main power line.

Q. From the main power line?

A. Yes sir.

Q. Where did you get this piece?

A. That was off of the main power line itself.

Q. Well, was this piece connected onto plaintiff's Exhibit L?

A. This piece—no sir. It was a separate line.

(Testimony of Archie Adirim.)

This is the switch line (indicating), and that is the main power line (indicating). [243]

Q. This, then, is the line that came into the building, a separate line coming in off of a trunk, that came upstairs and supplies power upstairs? Was this line found in the fire area?

A. Part of it was, I believe sir.

Q. Show me what part was found in the fire area?

A. I believe it was this end right here (indicating).

Q. Well, now, did it have these holes and punctures in it when you found it?

A. Yes, it did.

Q. And had these holes or punctures or anything been burned when you found it?

A. It looked like it had been burned, sir. I couldn't say whether it went through the fire or not. I don't know.

Q. This is the connection that is between the power and the BX that runs through the fire area? Is that correct now? A. Yes sir.

Q. Then what we have here in evidence now, is the line coming from the outside into the BX that ran through the fire area, that was laying in the attic?

A. You mean this piece (indicating)?

Q. Yes.

A. No sir. That comes from the switch.

Q. Does this line (indicating) go into the switch?

(Testimony of Archie Adirim.)

A. No sir. The way we found it, somebody had cut the power off. I believe you have heard about that from some other witness. That was cut and [244] came over from the main branch where the power comes up into the attic.

Q. Was this wire in any way connected with this wire (indicating)? A. No sir.

Q. But this was in the fire area (indicating)?

A. Yes sir.

Q. But there was no connection between the two? A. As far as I know, no sir.

Q. All right. I will ask to introduce this into evidence.

Mr. Hermann: No objection.

The Court : It may be received.

(Defendant's Exhibit No. 9 is received into evidence.)

Q. (By Mr. Crane): Now I will ask you if this defendant's Exhibit 9 or plaintiff's Exhibit L were in any way connected with or up to this cord?

A. No sir.

Q. Were they connected to any wires that might lead to that cord?

A. There was some more wires that we found.

Q. Connected to what?

A. Connected to nothing sir. No connections.

Q. Then will you answer my question.

A. Will you repeat it, please.

Mr. Hermann: We object on the grounds it doesn't show what time. [245]

Q. (By Mr. Crane): And the time you found

(Testimony of Archie Adirim.)

it—I understand this was all on the 30th of December, was it not?

A. Yes sir. On this wire, yes sir. No sir, it wasn't connected at the time it was found.

Q. All right. When you went in the building on the 30th of December and took your samples did you find any wires connected or to a switch to plug into?

A. Will you repeat that, Mr. Crane, please?

Q. Maybe I didn't make it clear. Handing you plaintiff's Exhibit H, was plaintiff's Exhibit H connected into any switch or to a plug, into any plug, or tied into any wire in the building?

A. Not when I found it, no sir.

Q. Did you ever see it connected in at any other time? A. No sir, I never did.

Q. Did you ever see or find any of these wires in evidence, ever connected to this soldering iron?

A. No sir.

Q. And you found this, you found plaintiff's Exhibit E in the attic, did you?

A. The soldering iron?

Mr. Hermann: I would like to object. Counsel is not cross examining but merely repeating everything that has previously been testified to.

The Court: That is his privilege if he wishes to do so. Objection overruled. [246]

Q. (By Mr. Crane): Now you say—did I understand you to testify that you found this stuck between the joists in the fire area?

A. Yes sir, laying down in the general area that

(Testimony of Archie Adirim.)

I showed you there, right in around here (indicating).

Q. All right. I will ask you to examine it again, rub your hand on it, wipe it off, make any test you want to of it, and see if you can find any of the smoke of the fire or soot on it?

A. No sir, I can't.

Q. As a matter of fact, from the appearance of it, that has never been through a fire, has it?

A. It's blue in places, but I couldn't tell you if it had ever been through a fire.

Q. The only part that shows heat is the soldering part—

A. Well it shows blue marks up here (indicating) that could have been caused by heat, but I don't know whether they were or not.

Q. How did that get in the attic then, if you know? A. I don't know sir.

Q. Now defendant's Exhibit I, you say you believe is the element of a soldering iron—I believe that is your testimony—and you found that in what part of the building?

A. That was in the upstairs back room laying on the bed.

Q. Can you see any evidence of fire on that soldering iron otherwise than the burned area just on the tip of the element? A. No sir. [247]

Q. Does that look like that piece ever went through a fire?

A. I don't know whether it did or not.

Q. Take a look and see.

(Testimony of Archie Adirim.)

A. I really don't know. I never have seen an element go through a fire so I don't know.

Q. Do you see any evidence of burns on it or anything? A. No sir.

Q. In other words, it's shiny and new?

A. No sir—yes.

Mr. Crane: May I pass these two exhibits to the jury?

The Court: I believe it would be well to take a recess for a few moments at this time. Ten minutes ought to be sufficient or twelve, say.

(Thereupon court recess for approximately ten minutes.)

After Recess

(At 4:20 p.m. court reconvened and the trial of this cause was resumed. Both counsel stipulated as to the presence of the jury and all other necessary persons were again present. The witness on the stand at recess resumed the stand for further cross examination.)

Mr. Crane: I believe just before recess, your Honor, I asked permission to pass these two articles to the jury, and asked the [248] witness to examine them to see if they had been through a fire or not.

The Court: Very well.

Q. (By Mr. Crane): Now calling your attention again to plaintiff's Exhibit L, I will ask you to examine that with the connecting wires as you found it, wouldn't a connection of that kind cause that wire to short circuit?

(Testimony of Archie Adirim.)

A. I don't know, Mr. Crane.

Q. You do not know?

A. No sir. I really don't.

Q. I will ask you if it isn't a fact that from the appearance of the exhibit, it would have been short-circuited and caused a fire, from the appearance of the exhibit?

A. I don't know. I don't know too much about wiring, and I really don't know. I couldn't see too far down in there.

Mr. Crane: That's all, your Honor.

Redirect Examination

Q. (By Mr. Hermann): Mr. Adirim, have you ever at any time seen any other Soldermaster soldering irons? A. Yes sir, I have.

Q. Did you examine that other Soldermaster?

A. Yes sir.

Q. What, if anything, was attached to the thread at the end? A. There was a handle.

Q. What kind of handle?

A. Wooden handle.

Q. Did you ever at any time see any evidence at the scene of the fire of a wooden handle such as that? [249]

A. No sir, I did not.

(There were no further questions and the witness was excused from the stand.)

Mr. Hermann: We are prepared to proceed but our next witness will take in excess of an hour.

The Court: Well, I would prefer if we go on

awhile because we are proceeding rather slowly and our time is running out.

EDWARD J. HARKABUS

is called and sworn as the next witness for the plaintiff and thereupon testified as follows:

Direct Examination

Q. (By Mr. Hermann): Mr. Harkabus, would you tell the Court and jury your full name?

A. Edward J. Harkabus.

Q. What is your occupation, Mr. Harkabus?

A. I am an arson investigator, a Special Agent with the National Board of Fire Underwriters.

Q. Would you explain what type of organization the Board of Fire Underwriters is.

A. The National Board consists of approximately 244 members, capital stock companies, who do engineering work, and who check on all home appliances to see that they are safe for home use, and in addition to that, I happen to be assigned to the arson department of the National Board.

Q. Would you please state your qualifications and length of employment.

A. I was a Special Agent with the FBI for a little over six years and I have been employed by the National Board for approximately four years. While in the FBI I had occasion to conduct cases, investigations concerning arson cases, and since I have been employed by the National Board I have investigated several hundred fires. I am also Deputy Fire Marshal for the Territory of Alaska. I

(Testimony of Edward J. Harkabus.)

conduct arson investigations throughout the Territory at the requests of fire chiefs, police chiefs or other officials who make a request of us.

Q. Have you had any special training in that field? A. Yes, I have.

Q. What did it consist of?

A. I have attended several seminars, one at U.S.C. at Berkeley, and I have been assigned with other special agents of the National Board to gain experience in this field of investigative work.

Q. Have you ever taught as a fire investigator?

A. I have.

Q. Where?

A. Primarily throughout the Territory of Alaska at various police schools sponsored by the FBI; and the Territorial Police and Marshal's office, city police departments and fire departments.

Q. Would you please state whether or not you belong to any professional organizations in that field?

A. I belong to the International Association of Arson Investigators and last year was Vice President for Alaska.

Q. Have you had any experience appraising the value of real or personal property?

A. During the course of investigations I do appraise the relationship [251] to the value of the structures involved or items involved.

Q. Would you please state whether or not you investigated a fire at the Kotzebue Grill?

A. I did.

(Testimony of Edward J. Harkabus.)

Q. On what day?

A. On December 30, 1957.

Q. What type of investigation did you conduct?

A. Well, I was requested by the United States Marshal's office here in Nome to conduct an investigation, a cooperative investigation with them, to determine the origin of the fire which occurred at the Kotzebue Grill.

Q. What was the first thing you did in that respect?

A. The first thing I did was to contact Deputy United States Marshal Archie Adirim to ascertain some of the circumstances surrounding the fire.

Q. What did you do after you had done that?

A. After I did that, I went to the Kotzebue Grill and interviewed Joe Brantley. Subsequently, after ascertaining from Deputy Marshal Adirim that the fire had occurred in close proximity to the attic in the Kotzebue Grill in the rear room, we went to that area.

Q. When you say "we", whom do you mean?

A. Deputy Marshal Adirim and myself.

Q. Who, if anybody, admitted you to the Kotzebue Grill? A. Joseph Brantley.

Q. Would you briefly describe what type of investigation you conducted in the attic?

A. Well, I conducted a physical investigation of the fire scene initially, in order to establish the point of origin of the fire. I eliminated the heating elements in the room such as stoves and any heating appliances [252] as the probable cause of

(Testimony of Edward J. Harkabus.)

the fire. I eliminated the spontaneous ignition based on extreme temperatures. The temperature, by the way, was 37° below zero at the time of the fire, according to the Weather Bureau reports. And I conducted an investigation in the attic area checking out the electric system and eliminated that as a cause of the fire. I established that—well, maybe I had better tell you how I did it.

Q. Yes.

A. Now starting with the stoves, I eliminated the stove as a cause of the fire. The stove was nowhere near the place where the fire originated. There is only one stove in this rear room.

Q. How did you eliminate the electric conduit?

A. Well, I eliminated the conduit in this manner:—

Mr. Taylor: Just a minute, your Honor. I am going to object to any further testimony along this line until it is shown that the electrical apparatus, wiring, BX or other conduit were in the same position as they were at the time of the fire.

The Court: Well, this witness would hardly be in a position to establish that. I think it has been sufficiently shown by other witnesses, except for what was removed by Mr. Little and a cord which someone of the boys removed.

Mr. Taylor: I think the testimony is that Mr. Little had cut away some of the wire.

The Court: Yes, that is true.

Mr. Hermann: I believe the testimony was that he had severed it, just cut it. [253]

(Testimony of Edward J. Harkabus.)

The Court: Yes. To get lights in the building. I do not think that factor would make the opinion of the investigator any less admissible. It is a circumstance which may be considered along with his testimony. Objection overruled.

A. Would you repeat the question, please?

(The reporter reads the previous question as follows:

“Q. How did you eliminate the electric conduit?”)

A. The conduit, actually there were four—you don't have a blackboard here, do you?

The Court: We do have, but it is in the back room. It's in pretty bad shape. I doubt if it could be used.

A. Maybe I can explain orally then. There was one line, the power line, that entered; where Mr. Little cut the line was on the other side of the wallboard in the attic, but the BX was still in position in the attic at the time I inspected it.

Q. Would you describe the position it was in in relation to the building.

A. Well, it would be running east and west. It fed four outlets in the back room, and there was a switch line that would have been on the right-hand side of the room as you face toward the rear, which is the east section of the building. That is my recollection. I could be mistaken on the directions. But the BX leading to the main power line lead to two switches on the left-hand side of the building and a five-strand wire on the right-hand

(Testimony of Edward J. Harkabus.)

side of the room, and from the switch line there was BX cable that ran over to this other circuit going into the power source. The point of origin in relation to [254] the four outlets was near the trapdoor, and although there was a short circuit in the BX it did not cause the fire.

Q. How did you determine that the short circuit in the BX did not cause this fire?

A. The short circuit in the BX was beyond the point of origin in the fire toward the power source.

Q. Would you explain how you determined the point of origin of the fire?

A. I determined the point of origin in the following manner: I interviewed Deputy Marshal Adirim and asked him where he had discovered the metal ring which he had shown me. He pointed out a place adjacent to the rear socket on the left-hand side as you walk in as being in close proximity to where he discovered the soldering iron case and the ring, the oval shaped ring. One was a solid ring and the other one, which coincided with the base, was open on top, and then a circular—if you have them here perhaps I could identify them, sir.

Q. Mr. Harkabus, I hand you plaintiff's Exhibit D and ask you if you can identify that?

A. This appears to be the ring that was shown to me by Deputy Marshal Adirim, and I note here on the back there is the initial or letter H. In furtherance of this, while we were conducting the investigation, I checked a wastebasket that was on

(Testimony of Edward J. Harkabus.)

the premises of the Kotzebue Grill and in every respect according to the diameter of this solid piece of metal, it coincided exactly with that, with the wastebasket bottom.

Q. I hand you plaintiff's Exhibit C and ask you if you can identify that. [255]

A. Well, this appears to be similar to the ring which was shown to me at that time and which I compared to the top portion of the wastebasket in the Kotzebue Grill.

Mr. Taylor: Just a minute, your Honor. I am going to object and ask that this testimony be stricken on the grounds that the wastebasket with which he made the comparison, your Honor, I think should be here in the courtroom for the purpose of showing the jury that it was a ring off of a wastebasket or a similar ring.

The Court: Again you are objecting to the weight of the evidence and that is not proper. That again is a question for the jury. Objection overruled.

Q. (By Mr. Hermann): I hand you plaintiff's Exhibit B for identification and ask you if you have ever seen that before and where?

A. These appear to be similar to the rings that were displayed by Deputy Marshal Adirim at the time I conducted the investigation, and I compared them with a one gallon ice cream container which was in the same room with the waste basket and similar to that container on the floor which I see here.

(Testimony of Edward J. Harkabus.)

Q. Would you proceed then to explain how you determined the origin of the fire.

A. In addition to these there was displayed to me by Deputy Marshal Adirim a soldering iron casing which he found in proximity to the rings.

Q. Then when you were making the investigation did you assume that the rings and the flat metal part and the soldering iron casing——

Mr. Crane: If your Honor please, I object——

The Court: Just a minute. He hasn't finished the question yet.

Q. (By Mr. Hermann): ——were in the position that Mr. Adirim described to you?

Mr. Crane: That is objected to, your Honor, as leading and suggestive. I realize that leading questions may be asked expert witnesses, if the man is qualified as an expert and is used as an expert witness.

The Court: Well, all right.

Mr. Crane: Has he been qualified as an expert?

The Court: I think so, sir.

Mr. Taylor: He is making reference to something not in evidence, reference to what somebody told him.

The Court: Well that is proper. Hypothetical questions may be posed to any one who is qualified as an expert in any field based upon certain assumptions which may be otherwise in evidence. That is a fundamental rule of evidence. Objection overruled.

A. I did.

(Testimony of Edward J. Harkabus.)

Q. (By Mr. Hermann): What, if anything, did you examine to determine the point of origin of the fire?

A. In the location where these had been pointed out to me where these had been placed, I dug into the sawdust at that point and sampled the area surrounding where these rings had been, or I understood these had been found. And at that point I dug up some of the sawdust, which had a smell of inflammable [257] fluid, and at that time I pointed it out to Deputy Marshal Adirim and United States Marshal Oliver and another man who wasn't identified to me, but I believe his last name was Kowunna, who was there. I took a specimen, put it into a clean container which I cleaned myself, so I know it was not contaminated, and it was subsequently placed into a jar which had been cleaned and identified with my initials and by the initials of the United States Deputy Marshal Adirim. This had an odor similar to gasoline.

Q. Mr. Harkabus, I hand you plaintiff's Exhibit K for identification and ask you if you are able to identify it.

A. Well I notice that my initial and signature is on the jar and the odor is the odor I smelled at that time, or similar to it. This sawdust was taken from the bottom portion on the plywood and at the time it was recovered it had a coating of water on it because of the fire fighting that had apparently occurred, but the odor was much stronger at that time than it is now, of course, since it evaporates.

(Testimony of Edward J. Harkabus.)

Q. What else, if anything, did you examine or investigate to determine the point of origin of the fire?

A. Well, I examined the portion directly above the point of origin, and the roof joists were charred there very deeply, in fact they had been burned away completely; and directly above the point which I considered to be the point of origin I noticed that the char pattern was heavier there or alligatoring.

Q. What does the word "alligatoring" refer to?

A. It refers to a piece of charred wood and is just the effect of the deep char on the wood. And I checked the depth of the char in relationship to other areas of the roof. And based on the fact that the roof joists at [258] the top of the eaves were completely charred, in my considered opinion that was the point of origin of the fire.

Q. Mr. Harkabus, I hand you plaintiff's Exhibit E for identification and ask you if you recognize it?

A. I do.

Q. Where have you seen it before?

A. This is the soldering iron displayed to me by Deputy Marshal Adirim and that he had found with the rings at the same point we discovered this sawdust.

Q. When was it displayed to you?

A. I beg your pardon.

Q. When was it displayed to you?

A. It was displayed to me on the 30th day of December.

Q. Do you know how hot a temperature a soldering iron of that kind can get?

(Testimony of Edward J. Harkabus.)

A. The temperature range of a soldering iron of this type, which is a 55 watt and 115 volt, is between 900 and 1800 degrees fahrenheit. That is based on reference and on checking other irons of a similar type.

Q. Do you know the kindling temperature of gasoline? A. I beg your pardon.

Q. I asked, do you know the kindling temperature of gasoline.

A. Kindling temperature wouldn't be a correct term in relation to gasoline, sir. In flammable vapors are given off from gasoline and has what is called a flash point at minus forty-five degrees, but the ignition temperature of the gasoline would be four hundred ninety-five degrees fahrenheit.

Q. Would you explain the difference between the flash point and the ignition point of gasoline.

A. Well, a flash point is confined—at which time flammable vapors are given off from a liquid. To simplify it, you all know gasoline vapors would disseminate from an open pail, and the ignition temperature to ignite these vapors would be 495 degrees.

Q. In your opinion would you state whether or not a soldering iron would achieve a high enough temperature to kindle gasoline?

A. Based on a range of temperature between nine hundred and eighteen hundred, it is well within the range of the ignition temperature of gasoline which is five hundred degrees.

Q. Do you know the ignition temperature of sawdust?

(Testimony of Edward J. Harkabus.)

A. Approximately five hundred degrees.

Q. Is that within the range of a soldering iron?

A. It is.

Q. Do you know what the kindling temperature of paper is?

A. Well roughly the kindling temperature of paper is within 446 and 450 degrees.

Q. Is that within the degrees of a soldering iron? A. Yes, sir.

Q. What determines the degree a soldering iron must achieve?

A. Well on this basis, if a soldering iron is to be used for soldering, obviously it has to have enough heat to melt tin and lead, which is the basis of most solder. Then if he is to melt tin, it would be about 1100 degrees fahrenheit, and lead would be somewhere around 660. Therefore it would have to be within the range he is using it. As outlined previously you can bring [260] it within various ranges depending on what type of soldering you had, whether it is aluminum, lead, or whatever it may be.

Q. What else, if anything, did you examine in the attic at the scene of the fire to determine the point of origin of the fire?

A. Well, in the back room there was an electric cord which was adhering to a case of canned goods, frozen to it, and that was located near a daybed in the backroom. And upon the daybed was a heating element and an extension cord. Those were

(Testimony of Edward J. Harkabus.)

photographed in position and photographs taken at my direction.

Q. Mr. Harkabus, I hand you plaintiff's Exhibit I and ask you if you have ever seen it before and if so, where?

A. This is the same heating element I observed on the daybed in the rear room of the Kotzebue Grill on the second floor, and I identify it because I have my initials on it and the sate, as well as the initials of Archie Adirim and U. S. Marshal Oliver.

Q. Do you know that is an element of a soldering iron?

A. I am familiar with the heating elements of soldering irons, and one of the ways you can tell is to slide it into the soldering iron casing and it fits. We had the casing and there was no other heating element that we discovered at the scene incidentally.

Q. How did you happen to discover this cord which you described?

A. Well, the cord, as I mentioned, was frozen to a crate or a case of canned goods and it was—I can't recall off-hand but I do believe there was another box or something laying over the top of it. But we discovered it and it was photographed in the frozen position on the box, also at my direction. [261]

Q. Mr. Harkabus, I hand you plaintiff's G-5 and G-6 for identification and ask you whether you can identify them.

(Testimony of Edward J. Harkabus.)

A. G-5 is a photograph of the heating element and extension cord on the daybed, taken facing south.

Q. Whose writing is that?

A. That is my handwriting on the back of the photograph.

Q. On what occasion did you put your handwriting on the back of the photographs?

A. I put my handwriting on primarily for identification and my own information. These photographs were taken by Harold Pilcher.

Q. Were you present when he took them?

A. I was.

Q. Does this accurately represent the scene you saw at the time? A. Yes, sir.

Q. What became of those pictures after they were taken?

A. After they were taken by the photographer, the exposed film with the film packs were turned over to me by the photographer, and I took them to Fairbanks when I left Kotzebue and had them developed.

Q. You had them developed? A. Yes, I did.

Q. Will you state whether or not you were present when they were developed?

A. I was not, but I checked the negative against the photographs.

Q. Do you have the negatives? A. I do.

Q. Now how about the other photograph, is the same true of that?

A. Exhibit 6, the same is true of that. This is

(Testimony of Edward J. Harkabus.)

a photograph taken facing south showing a soldering iron cord remnant frozen to a box or case of canned goods.

Q. Mr. Harkabus, I hand you plaintiff's Exhibit G-1, 2, 3, 4 and 7 and ask you if you recognize them?

A. Yes, I do. G-1, was taken in the rear room showing the trap door and light fixture, and the picture was taken facing the north wall. G-2 is a photograph taken in the loft facing west showing the power line to the switch, which is BX, and also the power source. Additionally it shows the rear partition where the line had been cut by Mr. Little, I believe it was. G-3 is a photograph taken in the loft showing the charred part or pattern of the roof, the eaves directly above the point of origin of the fire. G-4 is a picture taken in the loft facing the rear of the building, which would be east, showing BX and the five strand wire which was in the loft or the attic. G-7 is a photograph showing the point where the gasoline, where I discovered the gasoline, as well as——

Mr. Crane: Just a moment, please. I am going to object to the last statement and ask that it be stricken because Mr. Harkabus has not testified as to his discovery of any gasoline.

The Court: He referred to gasoline, did you not?

A. Well, sir, as I recall, what I smelled at that time had an odor similar to gasoline.

Q. (By Mr. Hermann): You didn't discover any gasoline though? [263]

(Testimony of Edward J. Harkabus.)

Mr. Taylor: Only you got something to smell like gasoline in the sawdust?

A. Yes, sir. It shows the charred pattern adjacent to the point of origin and shows the point where we discovered the sawdust.

Q. (By Mr. Hermann): Would you place those together, please. And what do Exhibits G-5 and G-6 show?

A. I believe I have already explained those, sir.

Mr. Hermann: At this time I would like to move that Exhibits G-5 and G-6 be introduced as evidence.

The Court: Those are the same ones which we eliminated from the stipulation?

Mr. Taylor: Yes. We have no objection.

The Court: They may be received.

(Plaintiff's Exhibits G-5 and G-6 are received into evidence.)

Mr. Hermann: I would like at this time to allow the jury to inspect these two photographs.

Mr. Taylor: There is considerable writing on the backs of them, your Honor, but we do not object to that.

The Court: Mr. Harkabus, you stated that was your writing?

Mr. Taylor: As I said, we do not object to them.

The Court: Very well. When the jury has completed their inspection of these exhibits it would appear to be time for adjournment for the day, if there is no objection.

Mr. Taylor: We have no objection, your Honor.